IN THE SUPREME COURT
OF THE UNITED STATES

No. 77- 515

HOLT CIVIC CLUB, etc., et al.,

Appellants,

vs.

CITY OF TUSCALOOSA, etc., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT
OF THE UNITED STATES

No. 77-

HOLT CIVIC CLUB, an unincorporated association, on behalf of its members; Jimmy Clements, Clyde Jones, Herbert Flora, Joe Perkins, Sr., Victoria Harris, Roy Johnson, Donald Lankford, individually, as representative members of the Holt Civic Club, and on behalf of all others similarly situated,

Appellants,

vs.

CITY OF TUSCALOOSA, a municipal corporation, on behalf of all other municipal corporations in the State of Alabama; C. SNOW HINTON, C. DELAINE MOUNTAIN, and HILLIARD FLETCHER, individually, as members of the Tuscaloosa City Commission and on behalf of all municipal executive officers and legislative bodies in Alabama; and GORDON ROSEN, individually, as City Recorder of Tuscaloosa, and on behalf of all other municipal judges in Alabama,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

Appellants appeal from the order of the United States District Court for the Northern District of Alabama, entered June 7, 1977, which order by a court of three judges dismissed appellants' complaint which sought injunctive relief against certain Alabama statutes granting extraterritorial powers to municipalities. Appellants also appeal from the order entered July 14, 1977, refusing to reconsider the dismissal of the complaint.

OPINIONS BELOW

The opinions of the United States District Court for the Northern District of Alabama dated June 7, 1977, and July 14, 1977, are unreported and are appended hereto at 1a and 4a, respectively. The opinion of the United States Court of Appeals for the Fifth Circuit reversing a previous dismissal and holding that a court of three judges was required is reported at 525 F.2d 653, and is appended hereto at 10a. The opinion of the district court refusing to call for the convening of a three-judge court and dismissing the complaint, entered July 31, 1975, is unreported and is appended hereto at 18a. Notice of appeal was filed August 5, 1977, and is appended hereto at 47a.

JURISDICTION

This action is brought under the fourteenth amendment of the Constitution of the United States and the following provisions of the United States Code: 28 U.S.C. §§1331, 1343, 2201 and 2281, 42 U.S.C. §1983.

The appeal is taken under 28 U.S.C. §1253. This Court has jurisdiction to hear the appeal because the dismissal by the district court was denial of injunctive relief based upon a "resolution of the merits of the constitutional claim presented below," MTM Inc. v. Baxley, 420 U.S. 799, 804 (1975), and not upon lack of jurisdiction, standing, or a similar point, Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974).

STATUTES INVOLVED

The three state statutes involved in this action are found in Ala. Code, Tit. 37 (1958 Recomp.). They are §§9, 585 and 733 of that title and are appended hereto at 6a.

QUESTIONS PRESENTED

1. May a state provide that residents of a geographical area shall be governed by an adjacent municipality, while prohibiting such residents from voting in municipal elections or otherwise participating in municipal government over themselves?

2. Does a claim of denial of equal protection by residents of such an area who are also

under the authority of a county government state a cause of action even though the relief they seek is not the right to vote in the municipality but rather the removal of the municipal authority over them?

STATEMENT OF THE CASE

Facts

The plaintiffs are an unincorporated association (representing its members who are similarly situated to the other named plaintiffs) and seven residents of an area located just outside the City of Tuscaloosa. The residents of this unincorporated community called Holt are subject to the "police or sanitary regulations" of the City of Tuscaloosa,[1] to the jurisdiction of the city recorder's court, and to the licensing authority[2]

1. The ambit of the "police or sanitary" ordinances is quite broad. It includes all building, gas, fire, electrical, and plumbing codes, inspection of food in restaurants and stores; prohibition of self-service gas stations; regulation of boardinghouses; traffic regulations; obscenity and nuisance ordinances; and prohibition of shooting galleries outside a small downtown area.

2. The licensing authority extends to all types of businesses, as well as cigarettes, tobacco products, wine, beer, and liquor. The license fees are limited to the amount reasonably necessary to cover the cost of the protection or regulation provided to the business or area, and may not be for general revenue purposes. White v. City of Decatur, 225 Ala. 646, 144 So. 873 (1932).

of the City because they are located within three miles of the corporate limits of the City. Real and personal property located outside the City is not subject to the City's property tax nor to its zoning power.[3]

The residents of the police jurisdiction are not residents of the City so they are not allowed to vote in City elections and they are not eligible for appointment or election to City offices.

Proceedings

The plaintiffs filed this action on August 7, 1973. The defendants moved to dismiss, which (along with plaintiffs' motions for the convening of a three-judge court and certification of the classes of plaintiffs and defendants) was twice briefed. On July 31, 1975, the district court denied certification of the class, refused to convene a three-judge court, and dismissed the complaint.

3. Municipalities may only adopt development plans for their area, Ala. Code, Tit. 37, §786 et seq. (1958 Recomp.). The Alabama Supreme Court has held that Title 37, §9, does not provide authority for a city to zone its police jurisdiction, but that this could be done by express act of the legislature. Roberson v. City of Montgomery, 285 Ala. 421, 233 S.2d 69 (1970).

The court of appeals reversed and remanded on December 31, 1975, ordering the convening of a three-judge court. The defendants thereafter renewed their motion to dismiss before the three-judge court and the plaintiffs renewed their motion for class certification. The three-judge court issued its order dismissing the equal protection claims, limiting the plaintiff class, and denying the certification of the defendant class on June 7, 1977. A timely motion for reconsideration of that order was denied on July 14, 1977.

THE QUESTIONS ARE SUBSTANTIAL

Probable jurisdiction should be noted in this appeal because the decision of the court below conflicts with a decision of the United State Court of Appeals for the Eighth Circuit in Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975), and because the decision below fails to follow this Court's precedent in the field of voting rights and equal protection.

Government without representation.

This action is analagous to a voting rights case in which some residents of an area are allowed to vote and others are not, yet each group is affected by the decision of the government in question. E.g., Dunn v. Blumstein, 405 U.S. 330 (1972), Cipriano v. City of Houma, 395 U.S. 701 (1969), Kramer v. Union Free School District, 395 U.S. 621 (1969), and Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975). The difference

arises only in the relief sought by the plaintiffs. In each of the cases cited above, the plaintiffs asked that they be included in the electorate because they were affected by the decisions of the government.

In this action, the residents of Holt have a choice: they could sue for the right to vote, or they could sue to have the government withdrawn from them. They have this choice because the withdrawal of the Tuscaloosa City government authority would still leave Holt residents under the jurisdiction of the Tuscaloosa County government.[4] The county in Alabama is a general governmental unit.

4. Beyond such governmental functions which are widely associated with counties -- highways, courts, elections, etc. -- an Alabama county has extensive powers, among which are the following: (all citations are to Ala. Code (1958 Recomp.) unless otherwise noted) levy taxes, support the poor, lay sewers and construct sewage treatment plants (Tit. 12, §12, 1973 Supp.); maintain streets (Tit. 12, §129); participate in a forest fire protection program (Tit. 12, §201(1)); mark boundaries of burial places (Tit. 12, §208); establish parks and museums (Tit. 12, §224); establish recreation boards (Tit. 12, §274); establish water conservation and irrigation corporations (Tit. 12, §§280, 291(1)), 1958 Recomp. and 1973 Supp.); finance waterworks through bonds or purchase outright (Tit. 12, §§4(7) and 109(10), 1975 Supp. and 1973 Supp.); establish land use controls in flood-prone areas (Tit. 12, §341, (footnote continued to next page)

The present case is most closely analogous to Little Thunder v. State of South Dakota, supra, in which an organized county governed itself and an attached area (known as an unorganized county) but did not include residents of the unorganized county in its electorate. Similarly, the City of Tuscaloosa governs itself and an attached area (known as the police jurisdiction) but does not include residents of the police jurisdiction in its electorate. The district court dismissed the equal protection claim believing that plaintiffs had sued for the wrong relief.

> Plaintiffs do not seek extension of the franchise to themselves [citing Little Thunder], but rather a declaration that extraterritorial regulation is unconstitutional per se. Equal protection has not been extended to cover such contention. 2a.

In Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973),

(footnote continued from preceding page)
1973 Supp.); adopt a building code (Tit. 55, §367(11)); construct or acquire airports (Tit. 4, §37); contract with a city for the city to provide fire protection (Tit. 37, §450(2)); acquire an electrical system for the county residents (Tit. 37, §353); create a housing authority (Tit. 25, §31); zone around an airport (Tit. 4, §63); establish sanitary conditions for livestock (Tit. 2, §367).

and Associated Enterprises v. Toltec Watershed Improvement District, 410 U.S. 743 (1973), this Court held that special-purpose districts such as irrigation and flood control authorities were not subject to the one person-one vote rule of Reynolds v. Sims, 377 U.S. 533 (1964), and Avery v. Midland County, 390 U.S. 474 (1968), because they "affect[ed] definable groups of constituents more than other constitutents." Salyer at 720-21, quoting Avery at 483. The Court held that the water storage district was of primary benefit to land and that restricting the franchise to landowners and apportioning it on the basis of the acreage owned was permissible.

In the present case, the City of Tuscaloosa exercises general governmental[5] authority over the police jurisdiction. The only things it provides for, or imposes upon, city residents but not police jurisdiction residents are zoning authority, school system, property tax, and part of the license taxes.

5. The appellants attack only the City's extraterritorial governmental powers, not its extramural power to do business.

> [The] ability or capacity for exercising control or authority over an area and persons therein ... might be termed the "governmental" power. ... [T]he ability of the municipality to do business or provide services in its capacity as a corporation [is its "corporate" power]. This corporate power is exercised extraterritorially more frequently than the government power.

(footnote continued to next page)

In Avery, this Court noted that

> while Midland County authorities may concentrate their attention on rural roads, the relevant fact is that the powers of the Commissioners Court include the authority to make a substantial number of decisions that affect all citizens whether they reside inside or outside the city limits of Midland.

Avery at 484. Similarly, the City of Tuscaloosa may concentrate its attention on the area within its corporate limits, but it does make a substantial number of decisions directly affecting the residents of the police jurisdiction without allowing them, as contrasted with the residents of Midland, even a malapportioned vote in city elections.

(footnote continued from preceding page)

Maddox, Extraterritorial Powers of Municipalities in the United States, 1-2 (1955) (emphasis in original). Thus, the appellants have no quarrel with the City's selling of water, sewer, or fire protection services, but do object to City regulation of their rights to dig wells, place septic tanks, or build homes as they please without City interference.

CONCLUSION

It may be, as the district court said, that equal protection has not been extended to cover the relief which the Holt residents have prayed for. Appellants have found no similar cases. But rejection of their claim should not be based on this. Government without the elective franchise is not "a republican form of government." Art. 4, §4, Constitution of the United States.

If the extraterritorial authority is a denial of equal protection, it may also be that appellants are not entitled to the relief they seek. Perhaps extension of the franchise rather than removal of the governmental powers is the only relief a federal court could grant, or it may decide that the State of Alabama should choose which form of relief it desires to abate an unconstitutional form of government. But the question of relief is not properly the basis for dismissing appellants' constitutional claim.

The Court should note probable jurisdiction and reverse the dismissal by the district court.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

HOLT CIVIC CLUB, et al., Plaintiffs,	)	[Filed June 7, 1977]
versus	)	C.A. No. 75-3323 [*]
CITY OF TUSCALOOSA, et al., Defendants.	)	

O R D E R

Before GODBOLD, Circuit Judge, McFADDEN and LYNNE, District Judges.

BY THE COURT:

The court has before it the motion of defendants to dismiss, as renewed with respect to the complaint as last amended, and the motions of plaintiffs to certify a defendant class and to certify a plaintiff class broader than a class composed of persons residing in the police jurisdiction of the City of Tuscaloosa.

It is hereby ORDERED as follows:

* This order erroneously bears only the court of appeals number.

1. Equal protection. Plaintiffs do not seek extension of the franchise to themselves, see Little Thunder v. South Dakota, 518 F.2d 1253 (CA8, 1975), but rather a declaration that extraterritorial regulation is unconstitutional per se. Equal protection has not been extended to cover such contention. The motion to dismiss is GRANTED with respect to the equal protection claim.

2. Due process. Plaintiffs' due process claim essentially is that extraterritorial regulation by a municipal government is per se a violation of due process. With respect to this due process claim, the motion to dismiss is GRANTED, with leave to plaintiffs to further amend within 45 days to specify particular ordinances of the City of Tuscaloosa which are claimed to deprive plaintiffs of liberty or property.

3. The motion to certify a defendant class is DENIED.

4. The motion to certify a plaintiff class broader than persons residing in the Tuscaloosa police jurisdiction is DENIED.

5. The three-judge court is DISSOLVED, and the case is REMANDED to District Judge Frank H. McFadden as a single judge for further proceedings.

DONE this the 7th day of June, 1977.

s/ John Godbold
United States Circuit Judge

s/ Frank H. McFadden
United States District Judge

s/ Seybourn H. Lynne
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
WESTERN DIVISION

[Filed July 14, 1977]

HOLT CIVIC CLUB, et al.,	)	
Plaintiffs,	)	CIVIL ACTION
vs.	)	No. 73-M-736
CITY OF TUSCALOOSA, et al.,	)	
Defendants.	)	

O R D E R

Upon consideration of the motion filed in behalf of plaintiffs to reconsider its judgment dismissing the equal protection and due process claims of plaintiffs entered herein on the 17th day of June, 1977,

It is ORDERED, ADJUDGED and DECREED by the Court that such motion be and the same is hereby denied.

DONE this 14th day of July, 1977.

s/ John C. Godbold
John C. Godbold
United States Circuit Judge

s/ Frank H. McFadden
Frank H. McFadden
United States District Judge

s/ Seybourn H. Lynne
Seybourn H. Lynne
Senior U.S. District Judge

Alabama Code, Title 37, (1958 Recomp.)

§9. Police jurisdiction; territorial. - The police jurisdiction in cities having six thousand or more inhabitants shall cover all adjoining territory within three miles of the corporate limits, and in cities having less than six thousand inhabitants, and in towns, such police jurisdiction shall extend also to the adjoining territory within a mile and a half of the corporate limits of such city or town. Ordinances of a city or town enforcing police or sanitary regulations and prescribing fines and penalties for violations thereof, shall have force and effect in the limits of the city or town and in the police jurisdiction thereof, and on any property or rights of way belonging to the city or town.

§585. Recorders; jurisdiction, powers and duties of. - It shall be the duty of the recorder to keep an office in the city, and

hear and determine all cases for the breach of the ordinances and by-laws of the city that may be brought before him, and he shall make report, at least once a month, of all fines, penalties and forfeitures imposed by him, or by any councilman in his stead. Such recorder is especially vested with and may exercise in the city and within the police jurisdiction thereof, full jurisdiction in criminal and quasi-criminal matters, and may impose the penalties prescribed by ordinance for the violation of ordinances and by-laws of the city, and shall have the power of an ex-officio justice of the peace, except in civil matters. In the absence from the city, death, disability, or inability of the recorder, any councilman may act as such recorder with his full power and authority.

§733. Licenses, general. - Any city or town within the state of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town but outside the corporate limits thereof; provided, however, that the amount of such licenses shall not be more than one-half the amount charged and collected as a license for like business, trade or profession done within the corporate limits of such city or town, fees and penalties excluded. Provided, further, that when the place at which any such business, trade or profession is done or carried on within the police jurisdiction of two or more municipalities which levy the licenses thereon authorized by this section, such licenses paid to and collected by that municipality only whose boundary measured to the nearest point thereof is

closest to such business, trade or profession. Provided that this section shall not have the effect to repeal or modify the limitations in the article relating to railroad, express companies, sleeping car companies, telegraph companies, telephone companies and public utilities, and insurance companies and their agents.

[525 F.2d 653]

HOLT CIVIC CLUB, etc., et al.,
Plaintiffs-Appellants,

v.

CITY OF TUSCALOOSA, etc., et al.,
Defendants-Appellees.

No. 75-3323
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.
Dec. 31, 1975.

* * *

Before COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

AINSWORTH, Circuit Judge:

The Holt Civic Club, an unincorporated association, and individual members thereof who reside outside the corporate limits of Tuscaloosa, Alabama, but within the 3-mile contiguous zone surrounding the city known as its municipal police jurisdiction, brought suit challenging the constitutionality of the

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

Alabama statutes creating such 3-mile police jurisdictions around Alabama municipalities with populations greater than 6,000 and 1.5-mile police jurisdictions around incorporated municipalities with smaller populations. Ala.Code, Tit. 37, §§ 9, 585 and 733.[1]

1. The relevant sections of Title 37 provide:

§ 9. Police jurisdiction; territorial. -- The police jurisdiction in cities having six thousand or more inhabitants shall cover all adjoining territory within three miles of the corporate limits, and in cities having less than six thousand inhabitants, and in towns, such police jurisdiction shall extend also to the adjoining territory within a mile and a half of the corporate limits of such city or town. Ordinances of a city or town enforcing police or sanitary regulations and prescribing fines and penalties for violations thereof, shall have force and effect in the limits of the city or town and in the police jurisdiction thereof, and on any property or right of way belonging to the city or town.

§ 585. Recorders; jurisdictions, powers and duties of. -- It shall be the duty of the recorder to keep an office in the city, and hear and determine all cases for the breach of the ordinances and by-laws of the city that may

(footnote continued to next page)

Plaintiffs seek to represent a class of all similarly situated Alabama residents who live in such contiguous zones surrounding Alabama

(Footnote continued from preceding page.)
be brought before him, and he shall make report, at least once a month, of all fines, penalties and forfeitures imposed by him, or by any councilman in his stead. Such recorder is especially vested with and may exercise in the city and within the police jurisdiction thereof, full jurisdiction in criminal and quasi criminal matters, and may impose the penalties prescribed by ordinance for the violation of ordinances and by-laws of the city, and shall have the power of an ex-officio justice of the peace, except in civil matters. In the absence from the city, death, disability, or inability of the recorder, any councilman may act as such recorder with his full power and authority.

§ 733. Licenses, general. -- Any city or town within the state of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town but outside the corporate limits thereof; provided, however, that the amount of such licenses shall not be more than one-half the amount charged and collected as a licenses for like business, trade or profession done within the corporate limits of such city or town, fees and penalites excluded. Provided, further, that when the place at which any such business, trade or profession is done or carried on within the police jurisdiction of two or more
(Footnote continued to next page.)

municipalities. Defendants are the City of Tuscaloosa, the three members of the governing body of the city (the members of the Commission Board), and the judge of the Recorder's Court of the city. Plaintiffs also seek a determination that these defendants are representative of a class consisting of all municipal executives, all municipal legislative bodies, and all municipal judicial officers or judges in the State of Alabama. The certification of these classes was not ruled upon. The court rejected plaintiffs' request made pursuant to 28 U.S.C. §§ 2281-84 that a three-judge court be convened and dismissed the complaint.

(Footnote continued from preceding page.)
municipalities which levy the licenses thereon authorized by this section, such licenses paid to and collected by that municipality only whose boundary measured to the nearest point thereof is closest to such business, trade or profession. Provided that this section shall not have the effect to repeal or modify the limitations in this article relating to railroad, express companies, sleeping car companies, telegraph companies, telephone companies and public utilities, and insurance companies and their agents.

Section 2281 is not applicable unless (1) a state statute with state-wide applicability is challenged, (2) an "officer of such state" is sought to be restrained; (3) injunctive relief is sought, and (4) there is a substantial question as to the validity of the statute under the Federal Constitution. In this case, plaintiffs clearly seek injunctive relief challenging the enforceability of a statute which does have state-wide applicability. Despite the fact that local officers of the City of Tuscaloosa named in the complaint are "chosen in a political subdivision and act[] within that limited territory," they are charged with applying statutes embodying "a policy of statewide concern." Spielman Motor Sales Co., Inc. v. Dodge, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322 (1935). According to the allegations in plaintiffs' suit, the statutes in question create a pattern of disfranchisement

with regard to local matters in the police jurisdictions surrounding Alabama municipalities. As a practical matter, local officials are the only public officers in the state who can exercise the state-created extraterritorial municipal authority which impinges on these unrepresented areas. Accordingly, we conclude that defendants are officers within the meaning of section 2281 for three-judge court purposes. See Sailors v. Board of Education of the County of Kent, 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967); Moody v. Flowers, 387 U.S. 97, 101-102, 87 S.Ct. 1544, 1548, 18 L.Ed.2d 643 (1967)(dictum)("a three-judge court need not be convened where the action seeks to enjoin a local officer ... unless he is functioning pursuant to a statewide policy and performing a state function"); Gilmore v. James, N.D.Tex., 1967, 274 F.Supp. 75 (three-judge court), aff'd,

389 U.S. 572, 88 S.Ct. 695, 19 L.Ed.2d 783 (1968). See also Board of Regents of the University of Texas System v. New Left Education Project, 404 U.S. 541, 544 n.2, 92 S.Ct. 652, 654 n.2, 30 L.Ed.2d 697 (1972)(dictum).

Finally, in light of Supreme Court standards for determining the substantiality of constitutional questions for purposes of section 2281, we cannot agree with the district court that the plaintiffs' claim in this case is "wholly insubstantial," Goosby v. Osser, 409 U.S. 512, 518, 93 S.Ct. 854, 858, 35 L.Ed. 2d 36 (1973), "essentially fictitious," Bailey v. Patterson, 369 U.S. 31, 33, 82 S.Ct. 549, 551, 7 L.Ed.2d 332 (1962), or "obviously frivolous," Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288, 30 S.Ct. 326, 327, 54 L.Ed. 482 (1910).

Under the circumstances, the case is remanded to the district judge for the convening of a three-judge court.

Reversed and remanded.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

HOLT CIVIC CLUB, et al., Plaintiffs,	)	[Filed July 31, 1975]
-v-	)	CIVIL ACTION NO. 73-M-736
CITY OF TUSCALOOSA, et al., Defendants.	)	

MEMORANDUM OPINION

This cause is before the Court on plaintiffs' request for a three-judge court pursuant to 28 U.S.C. § 2281 and on defendants' motion to dismiss the complaint.

Plaintiffs sue on behalf of themselves and others similarly situated. Plaintiffs are Holt Civic Club, an unincorporated association, and individual members thereof who reside in the Holt Community, an unincorporated community outside the corporate limits of Tuscaloosa but within three (3) miles thereof. Plaintiffs seek to represent

a class of Alabama residents who live outside incorporated municipalities but within 1.5 or 3-mile contiguous zones known as municipal police jurisdictions.

Defendants are the City of Tuscaloosa, three members of the city commission, and the City Recorder. The defendants are said to be representative of a state-wide class composed of municipalities and municipal officials.

Plaintiffs' primary allegaion, in the twice amended complaint, is that as residents of the Tuscaloosa police jurisdiction they are governed by Tuscaloosa ordinances but are not able to vote in municipal elections, resulting in a denial of due process and equal protection of the laws of the United States. Plaintiffs also allege that each extension of a municipal corporate limit extends the

police jurisdiction, expanding the denial of the right to vote and bringing additional persons within that police jurisdiction without their permission and without due process of law.

The action is premised on the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1983. Plaintiffs assert jurisdiction under 28 U.S.C. § 1331, 1343, 2201 and 2281.

The constitutionality of three Alabama statutes is challenged: Title 27 [sic 37], §§ 9; 585; and 733, Ala. Code 1940 (Recomp. 1958).

Title 37, § 9, Ala. Code 1940 (Recomp. 1958), authorizes a municipal police jurisdiction in an area contiguous to corporate limits of either three (3) or one and one-half (1.5) miles, depending upon the population of

the municipality, to enforce police and sanitary regulations, and accompanying licensing provisions.

Title 37, § 585, Ala. Code 1940 (Recomp. 1940[sic]), sets forth generally the Recorder's duties.[1/] Plaintiffs attack only the Recorder's statutory power to enforce all municipal ordinances, civil or criminal, applicable to the police jurisdiction.

Title 37, § 733, Ala. Code of 1940 (Recomp. 1958), permits a municipality to fix and collect licenses and fees for businesses, trades or professions operating solely within its police jurisdiction. Such fees may be no more than one-half those applicable within the corporate limits and by

1/ Sections 583, 584 and 586 define further the Recorder's powers; and §§ 587-596, inclusive, provide for various additional judicial proceedings of an appellate nature beyond the Recorder's level. However, none of these provisions are challenged by plaintiffs.

judicial interpretation must be reasonably related to the licensing and inspection duties associated with the appropriate regulations. The statute also contains provisions to eliminate double collection in overlapping police jurisdictions.

The main thrust of plaintiffs' complaint is against Section 9 which sets up the police jurisdiction. The attack on the other sections is against the exercise of powers granted thereunder within the police jurisdiction.

Plaintiffs show, as typical of the inequality of their position, that the City of Northport, Alabama, or most of it, is within three miles of Tuscaloosa. Tuscaloosa does not, and cannot, exercise its police jurisdiction over residents of Northport or its police jurisdiction; but Tuscaloosa does, and can, exercise its police jurisdiction over the residents of Holt Community, who allegedly stand

in the same geographical proximity and political relation to Tuscaloosa as do the residents of Northport and its police jurisdiction. Thus, plaintiffs contend, the residents of Holt Community are "governed" by Tuscaloosa, but the residents of Northport are not.[2/]

Plaintiffs seek a declaration that § 9 in its entirety and §§ 585 and 733, each partially, are unconstitutional and an injunction enjoining their enforcement or operation. While plaintiffs argue--apparently to avoid the tax anti-injunction statute (26 U.S.C. § 7421)--that they do not challenge the taxes and fees collected, they do seek a preliminary injunction requiring that all taxes and fees collected from persons or

2/ The "political relation" contention apparently ignores the distinguishing fact that Northport is a municipality incorporated under Alabama law, whereas Holt is an unincorporated community.

businesses solely within the Tuscaloosa police jurisdiction be considered to have been paid under protest for purposes of rebate should the statutes be found unconstitutional.

Defendants challenge plaintiffs' standing to bring this action and this Court's jurisdiction. There are two "standing" questions: one is addressed to the question of plaintiffs' right to sue on behalf of residents of the police jurisdiction zone; and the other, to the right to sue on behalf of persons living beyond the current police jurisdiction who may be brought within such jurisdiction later. Defendants further assert that the Court does not have subject matter jurisdiction.

Plaintiffs, as residents of Tuscaloosa's police jurisdiction, are the only parties who could attack § 9 and assert equal protection claims herein since they are the only persons who are affected by the authority asserted

over the police jurisdiction. Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 93 S.Ct. 1224 (1973); Community for Pub. Ed. and Religious Liberty v. Rockefeller, 322 F.Supp. 678 (S.D.N.Y. 1971). The Court, therefore, is of the opinion that plaintiffs have the requisite standing to raise this issue.

However, the Court is of the opinion that plaintiffs have no standing insofar as they seek to represent persons currently living beyond the police jurisdiction who may later be brought within it by an expansion of the Tuscaloosa corporate limits.

Defendants contend that since municipal corporation is not a "person" for purposes of 42 U.S.C. §1983 under the teachings of City of Kenosha, Wis. v. Bruno, 412 U.S. 507, 37 L.Ed.2d, 109, 93 Sup.Ct. 2222 (1973), the

Court lacks jurisdiction. Insofar as the city itself is concerned this is true. However, there are other individual defendants and the Court has subject matter jurisdiction. Adams v. City of Colorado Springs, 308 F.Supp. 1397, aff'd 399 U.S. 901, 90 S.Ct. 2197 (1970). It is unnecessary, therefore, to consider defendants' other jurisdictional contentions.

The next question considered is whether a three-judge court should hear this case.

The federal three-judge statute, 28 U.S.C. § 2281, reads in pertinent part that

> An interlocatory or permanent injunction restricting the enforcement, operation or execution of any state statute by restraining the action of any officer of such state in the enforcement or execution of such statute ... shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges ....

Stated briefly, § 2281 will not be applicable unless (1) a state statute is challenged, (2) a state officer is a party-defendant, (3) injunctive relief is sought, and (4) it is claimed that the statute under attack is contrary to the United States Constitution. Section 2281 is "an enactment technical in the strict sense of the term and [is] to be applied as such." Phillips v. United States, 312 U.S. 246 (1941). Accordingly, failure to meet any of these basic requirements is fatal to the request for a three-judge court; and the case should be heard by a single district court judge. Morales v. Turman, 383 F.Supp. 53 (E.D. Tex. 1974).

First, the challenged statute must be a "state" statute, of general and statewide application. It is not, however, simply an act passed by a state legislature. Rorick v. Board of Comm'nrs., 307 U.S. 208, 59 S.Ct.

808 (1939) (a three-judge court not required in a challenge to a Florida statute which only affected a single drainage district's bond issue, even though an earlier Florida statute created the entire state drainage district system); Moody v. Flowers, 387 U.S. 97 (1967) (three judges not necessary in a suit challenging a county election scheme required by a state statute since the scheme applied only to the county concerned).

While there is no clear-cut test to identify a "matter of statewide concern," there are significant factors to be considered: first, whether the statute applies only to a limited geographic area, Moody v. Flowers, supra; Sailors v. Bd. of Education, 387 U.S. 105 (1967); Rorick v. Bd of Comm'nrs, supra; second, whether the issue is such that a

decision against the statute will have far-reaching effects, Flast v. Cohen, 392 U.S. 83, 89-80, 88 S.Ct. 1942 (1968); and third, whether the actions sought to be enjoined are a reflection of significant state policy, although those actions may affect only one area of the state, Spielman Motor Co. v. Dodge, 295 U.S. 89, 94, 55 S.Ct. 678 (1935).

In light of the foregoing considerations, the Alabama statutes in question do not appear to meet the standards of the "state" statute requirement of § 2281. While each of the statutes is an enactment by the Alabama state legislature which purports to apply to all Alabama municipalities, there is no indication that they are anything other than enabling statutes. As such, they allow a municipality to enforce certain types of regulations within a limited contiguous area if it chooses.

A constitutional attack on state enabling legislation does not differ substantially from such an attack on clearly local city ordinances; and three judges would not be required to hear the case. Ex parte Collins, 277 U.S. 565, 48 S.Ct. 585 (1928); McCrimmon v. Daley, 418 F.2d 366 (7th Cir. 1969); Hardy v. Bd. of Supervisors of Dinwiddie County, Va., 387 F.Supp. 1252 (E.D. Va. 1975); Morales v. Turman, supra, at 63-64; Aberdeen Cable TV Service v. City of Aberdeen, S.D., 325 F.Supp. 406 (D.S.D. 1971); Davis v. City of Little Rock, Ark., 136 F.Supp. 725 (E.D. Ark. 1955). Nothing in the complaint indicates that the Tuscaloosa police jurisdiction regulations are from any source other than purely local municipal ordinances.

The Court is of the opinion that the actions sought to be enjoined do not reflect

a policy of such magnitude as to require the deliberation of three federal judges rather than one. Even where a decision may have repercussions throughout the state, the focus of the constitutional attack may still be purely local and not require three judges. Griffin v. County School Bd. of Prince Edward County, Va., 377 U.S. 218, 228, 84 S.Ct. 1226 (1964); Bd. of Regents of the Univ. of Texas System v. New Left Education Project, 404 U.S. 541, 543-44 (1972); Dove v. Bumpers, 497 F.2d 895 (8th Cir. 1974)(Arkansas statute couched in general terms applied to only two cities); Rothblum v. Bd. of Trustees, 474 F.2d 891 (3d Cir. 1973) (policy of trustees for the only two New Jersey medical schools created by state statute not a matter of statewide concern or policy); Mortillaro v. Louisiana, 356 F.Supp. 521, 526 (E.D. La.

1972) (attacks on state constitutional provisions having only local application do not require three judges); Ripley v. Stidd, 308 F.Supp. 854 (D. Minn. 1970) (three judges not required for local statute even where it uses terminology identical to state statute).

Second, a state official must be made a party-defendant to a suit requesting a three-judge court. No state officer is named in the complaint; and plaintiffs so concede. Plaintiffs argue, however, that the named defendants are local officials who perform state functions, thereby coming within the exception for local officials who act in a matter of general, statewide concern. City of Cleveland v. United States, 323 U.S. 329 (1945); Spielman Motor Co. v. Dodge, supra.

The Court cannot agree. These Tuscaloosa officials are performing tasks which are

entirely local in nature. The fact that the state has delegated to a municipality the general authority to promulgate police and sanitary regulations to be exercised extra-territorially does not in and of itself make local elected officials arms of the state for purposes of § 2281. Davis v. City of Little Rock, Ark., supra, at 728; Connor v. Bd. of Comm'nrs of Logan County, Ohio, 12 F.2d 789 (S.D. Ohio 1926).

Moreover, the Fifth Circuit has recently reaffirmed the severity of this requirement. Relying upon Ex parte Collins, supra, and Petition of Public Nat'l Bank of N.Y., 278 U.S. 101 (1928), the Court in Tramel v. Schrader, 505 F.2d 1310, 1312 (5th Cir. 1975), held that a three-judge court "is not required when an action is brought only against local officials who are enforcing municipal orders." See, also, Ripley v. Stidd, supra.

Third, injunctive relief must be sought. Plaintiffs here seek an injunction against the enforcement of the statutes and to that extent meet this requirement. A portion of the relief sought, however, i.e., a determination that the paying of taxes be judicially determined to have been under protest cannot be granted and that portion of the complaint may be dismissed by a single judge. Maryland Citizens for a Representative Assembly v. Governor of Maryland, 429 F.2d 606 (4th Cir. 1970). The mere prayer for injunctive relief is not sufficient. The Court must examine the complaint for substantive allegations which would support a claim for injunctive relief. If the complaint fails to allege facts sufficient to invoke traditional equitable jurisdiction, there is no need to convene a three-judge court. Majuri v. United States, 431 F.2d 469 (3d Cir. 1970).

Traditionally, courts have weighed four factors in considering a request for injunctive relief: (1) whether there is a substantial likelihood that plaintiffs will prevail on the merits; (2) whether there is a substantial threat that plaintiffs will suffer irreparable injury if interlocutory relief is not granted; (3) whether the threatened injuries to plaintiffs outweigh the threatened harm the injunction may do to the defendants; and (4) whether the granting of a preliminary injunction will disserve the public interest. See, Buchanan v. U.S. Postal Service, 508 F.2d 259, 266 (5th Cir. 1975); Allison v. Froehlke, 470 F.2d 1123, 1126 (5th Cir. 1972).

Neither plaintiffs nor defendants herein have addressed the question of the presence or absence of the requirements of equitable

jurisdiction. The Court is of the opinion that the complaint does not show a basis for equitable relief.

The final requirement for the three-judge court is that the statute under attack must be challenged on the ground that it is contrary to the United States Constitution. The complaint alleges a violation of the Fourteenth Amendment's equal protection and due process clauses, but the alleged constitutional issue alone is not enough. There must be a substantial federal question. In the absence of a substantial federal question no need exists for a three-judge court. Jones v. Branigin, 433 F.2d 576 (C.A. 6, 1970). The Court is of the opinion that the complaint does not present a substantial federal constitutional question which would require decision by a three-judge court even if the other

requirements were present. Thus, none of the requirements for a three-judge court is present and one need not be convened. The Court is also convinced that the complaint is due to be dismissed.

The Fourteenth Amendment does not prohibit states or political subdivisions thereof from prescribing regulations under their police power limited in either the objects to which they are directed or by the territory in which they are to operate, so long as all persons subjected to such legislation are treated alike under similar circumstances, both in the privileges conferred and in the liabilities imposed. The test to be applied is that there must be a reasonable relation between the objective of the statute under attack and the means used to achieve it. Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1884);

Hayes v. Missouri, 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed. 578 (1887); Marchant v. Pennsylvania R.R. Co., 153 U.S. 380, 14 S.Ct. 894, 38 L.Ed. 751 (1894).

The general test applied where denial of equal protection allegedly rests upon arbitrary classification under the police power is that: (1) states and their delegatees are given a wide scope of discretion in classifying under police power regulations, which will not be disturbed unless there is no reasonable basis for the classification; (2) where there is a reasonable basis for it, the classification need not be made with "mathematical nicety" and will not be invalid because in practice there is some inequality; (3) when a classification is challenged, if any set of facts reasonably can be conceived to support it, the existence of those facts

at the time the law creating the classification was enacted must be assumed; and (4) those attacking the law and the classification bear the burden of showing there is no reasonable basis for it and that the classification is essentially arbitrary. McGowan v. Maryland, 366 U.S. 420 (1961); Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580 (1935); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

Although approached from a different consideration, the "Milk Cases" (and other cases involving the Commerce Clause) support the conclusion that the extra-territorial operation of properly delegated police power does not violate the Fourteenth Amendment. Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349, 354 (1951); H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949); Parker v. Brown, 317 U.S. 341 (1943) (raisons); Milk Control

Bd. v. Eisenberg Farm Products, 306 U.S. 346 (1939); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935); Miller v. Williams, 12 F.Supp. 236, 241 and 244 (D. Md. 1935).

Generally, those cases involved challenges to various state statutes or local ordinances on the ground that the inspection and price restrictions which were placed on producers of milk and other party products who were beyond certain geographic limitations imposed by those regulations were an unconstitutional burden on interstate commerce. Where facts supported it, the Supreme Court found the regulations created an economic barrier which protected a major state or local industry and thus burdened interstate commerce. In each instance, however, the Court first had to consider the police power arguments advanced by the state or municipality before it could

conclude that those arguments merely disguished [sic] the real purpose of creating the economic barrier.

In each instance, the first and only substantial justification for the existence and operation of the regulations was in furtherance of the health, safety and welfare of the citizens involved--a valid exercise of police power. At no time, as far as the Court can determine, was a regulation ruled unconstitutional on the ground that its extra-territorial operation, in and of itself, violated the equal protection clause when it was shown that such operation was a necessary and valid exercise of police power. This was true even where there was some adverse economic impact on a plaintiff. In the instant case, the mere fact that the operation of § 9 subjects plaintiffs to some tenuous government influence over which they may have

no voice does not, of itself and without more, invalidate a reasonable exercise of properly delegated police power, even where operating extra-territorially.

It is clear that Alabama may delegate to local governments the portions of its police power which come under the heading of police and sanitary regulations. Within constitutional limits, a local government may exercise that power unchecked and may exercise it, within further limits, extra-territorially. The Court has been shown nothing which would undercut this presumption of constitutionality. Plaintiffs make no allegations of invidious classifications. The only classification attacked by way of example is the distribution between the Holt Community and the City of Northport. As noted at p. 3 [23a], supra, this distinction is valid.

Plaintiffs argue, however, that, as did the milk producers, the operation of the statute infringes on a constitutionally guaranteed right--here, the right to vote. Plaintiffs analogize their position to that of those who prevailed in the voting cases which have held, generally, that any dilution or debasement of the right to vote, once that right has been found to exist, is a denial of equal protection of the laws.

It does not appear, however, that plaintiffs come within the ambit of the voting rights and election cases. As the Court reads those decision,[3/] the crucial factor is that

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3/ See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972); Hadley v. Junior College Dist. of Metro. Kansas City, Mo., 397 U.S. 50 (1970); Cipriano v. City of Houma, La., 395 U.S. 701 (1969)(per curiam); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Avery v. Midland County, Tex., 390 U.S. 474 (1968) Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966); Citizens for Community Action at the Local Level. Inc. v. Ghezzi, 386 F.Supp. 1 (W.D.N.Y., 1974).

the franchise was granted to one group of persons to the detriment of another group. Most often, one group had votes with weight disproportionate to the votes of others, or there had been an intentional juggling of boundaries for the purpose of excluding a particular group from voting. Of greater importance, however, is the fact that the adversely affected group already possessed the minimum voting requirements within the particular jurisdiction in which it sought to vote (i.e., state legislative or school board elections). See, Kramer v. Union Free School Dist. No. 15, supra; Gray v. Sanders, 372 U.S. 368 (1963).

Plaintiffs do not contend that they meet any of the voter requirements for voting in Tuscaloosa elections. Thus, the existence of the basic right is absent; and this would

preclude plaintiffs from asserting that they are denied the right to vote for the city government since they have no standing to do so. Garren v. City of Winston-Salem, N.C., 463 F.2d 54 (4th Cir. 1972).

The fact that plaintiffs do not enjoy the same recourse to the ballot box as citizens of Tuscaloosa is not the result of an invidious or suspect classification or any other act of discrimination. Since the plaintiffs have not shown that they are being deprived of any benefit or right otherwise due them on the basis of an unreasonable or unjustified classification, there is no occasion to consider or apply the compelling state interest test as in Dunn v. Blumstein, supra; Garren, supra.

There does not appear to exist any set of facts which, if adduced, would permit the

Court to grant the relief sought by plaintiffs. The complaint, as amended, therefore, must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. A separate order will be entered accordingly.

s/ Frank H. McFadden
Chief Judge

July 30, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
WESTERN DIVISION

[Filed Aug. 5, 1977]

HOLT CIVIC CLUB, et al.,	)	
Plaintiffs,	)	
V.	)	CA 73-M-736
CITY OF TUSCALOOSA, et al.,	)	
Defendants.	)	

NOTICE OF APPEAL

Notice is hereby given that Holt Civic Club, an unincorporated association, Jimmy Clements, Clyde Jones, Herbert Flora, Joe Perkins, Sr., Victoria Harris, Roy Johnson, Donald Lankford, plaintiff above named hereby appeal to the Supreme Court of the United States from the Order denying plaintiffs' motions to certify plaintiffs and defendants as representatives of state-wide classes and to enjoin the enforcement of certain statutes and practices, entered on 7 June 1977, and

the Order denying reconsideration thereof, entered on 14 July 1977. This appeal is taken under 28 USC § 1253, relating to appeals from district courts composed of three judges.

SUBMITTED BY:

s/ Edward Still
Edward Still
601 Title Building
Birmingham, AL 35203
205/322-1694.

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that, prior to or immediately after filing a copy of the foregoing with the Court, I mailed or delivered a copy of the foregoing to the following:

Mr. J. Wagner Finnell
Box 2089
Tuscaloosa, AL 35401

DATE: 5 Aug. 77 s/ Edward Still
EDWARD STILL

APPENDIX

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-515

HOLT CIVIC CLUB, etc., et al.,

Appellants,

vs.

CITY OF TUSCALOOSA, etc., et al.,

Appellees.

On Appeal From
The United States District Court
For the Northern District of Alabama

Filed October 3, 1977
Jurisdiction Postponed March 6, 1978

INDEX*

*Explanatory note. The complaint was amended several times and several motions to dismiss were filed (see relevant docket entries). The parties have designated the last amended complaint and last motion to dismiss. The complaint included herein was on file prior to the first appeal and the motion to dismiss included herein was filed on remand. Thus, the motion to dismiss which the single judge acted on is not reproduced but it is not significantly different from the motion which is included.

Excerpts from three sets of interrogatories and answers thereto have been included. These are grouped together and are reproduced with answers placed immediately after the corresponding interrogatory for clarity.

RELEVANT DOCKET ENTRIES

Docket Entries	Date
Complaint	Aug. 7, 1973
Interrogatories to Defendant	Aug. 16, 1973
Motion to Dismiss	Sept. 10, 1973
Interrogatory Answers	Sept. 26, 1973
Amendment to Complaint	Oct. 3, 1973
Motion to Dismiss (additional grounds)	Oct. 18, 1973
Order that the parties brief the propriety of a three-judge court, standing, class representation and the existence of a substantial federal question	Oct. 30, 1973
Interrogatories to Defendant	May 13, 1974
Interrogatory Answers	June 6, 1974
Motion to Amend Complaint	July 22, 1974
Reassignment of grounds for motion to dismiss and additional grounds	Aug. 12, 1974
Order granting motion to amend complaint and directing response to motion to dismiss	Aug. 22, 1974
Motion to dismiss of added defendants	Sept. 4, 1974
Memorandum opinion	July 31, 1975
Notice of appeal	Aug. 18, 1975
Opinion of the court of appeals	Dec. 31, 1975
Order designating court of three judges	Jan. 12, 1976
Interrogatories to Defendants	Jan. 29, 1976
Motion to Dismiss	Apr. 9, 1976
Order	June 7, 1977
Motion for Reconsideration	June 17, 1977

Docket Entries	Date
Order denying motion for reconsideration	July 14, 1977
Notice of Appeal	Aug. 5, 1977
Interrogatory Answers	Mar. 28, 1978*

OPINION OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
July 31, 1975

This opinion is found in the jurisdictional statement appendix beginning at page 18a.

* * *

OPINION OF THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT
December 31, 1975

This opinion is found in the jurisdictional statement appendix beginning at page 10a.

* * *

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* These answers were served on or about March 31, 1976, but apparently were not filed with the clerk. The three interrogatory answers included are essentially updates of previous answers already on file. Counsel for appellants sent a copy of the third interrogatories answers to the district court clerk and they were stamped filed on March 28, 1978.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

[Filed July 22, 1976]

HOLT CIVIC CLUB, an unincorporated association, on behalf of its members; Jimmy Clements, Clyde Jones, Herbert Flora, Joe Perkins, Sr., William Gordon, Victoria Harris, Roy Johnson, Donald Lankford, individually, as representative members of the Holt Civic Club, and on behalf of all others similarly situated,

PLAINTIFFS,

VS.

CITY OF TUSCALOOSA, a municipal corporation, on behalf of all other municipal corporations in the State of Alabama; C. SNOW HINTON, C. DELAINE MOUNTAIN, and HILLIARD FLETCHER, individually, as members of the Tuscaloosa City Commission and on behalf of all municipal executive officers and legislative bodies in Alabama; and GORDON ROSEN, individually, as City Recorder of Tuscaloosa, and on behalf of all other municipal judges in Alabama,

DEFENDANTS.

C.A. No. 73-M-736

MOTION TO AMEND COMPLAINT

Come now the Plaintiffs and move to substitute this Amended Complaint for the Complaint as amended heretofore.

1. This action arises under the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution to the United States, and 42 U.S.C. §1983. Jurisdiction is vested in this Court by 28 U.S.C. §§1331, 1343, 2201 and 2281.

PLAINTIFFS

2. The Holt Civic Club is an unincorporated association of residents of the Holt community in Tuscaloosa County who have joined together to promote the best interests of the Holt community. The Holt Civic Club through the members listed sues on behalf of its members, under the authority of FRCP 23.2.

3. The individual Plaintiffs, Jimmy Clements, Clyde Jones, Herbert Flora, Joe Perkins, Sr., William Gordon, Victoria Harris, Roy Johnson and Donald Lankford, are each (1) members of the Holt Civic Club; (2) residents of Tuscaloosa County, Alabama; (3) residents of the Holt community living outside the City of Tuscaloosa but witnin [sic] three miles of said city.

4. The named individual Plaintiffs are representative of the class of residents of

Alabama who live outside any incorporated municipality but within the "police jurisdiction" of a city or town. These individuals meet the requirements of Rule 23(a) of the FRCP and this action may be maintained as a class action under paragraph (b)(1) or (b)(2) of said Rule.

DEFENDANTS

5. [Deleted]

6. The City of Tuscaloosa is a municipal corporation organized and operating under the laws of the State of Alabama. C. Snow Hinton, C. Delaine Mountain, and Hilliard Fletcher are the City Commission of Tuscaloosa and therefore combine the legislative and executive functions. Gordon Rosen is the City Recorder for Tuscaloosa and is charged with the duty of judicially administering the ordinances of Tuscaloosa. The City of Tuscaloosa and each named Defendant are sued as representatives of all municipalities, all municipal executives, all municipal legislative bodies, and all municipal judicial officials in the State of Alabama. The prerequisites and requirements of Federal Rules of Civil Procedure 23(a) and (b)(1) or (b)(2) have been met.

FACTS AND CAUSES OF ACTION

7. Alabama Code, Tit. 37, §9, provides that municipalities of six thousand or more inhabitants shall have a police jurisdiction of three (3) miles from its city limits while smaller municipalities shall have a one and a half (1.5) mile police jurisdiction. Police jurisdiction is defined by that section as the area within which the municipality may enforce police or sanitary regulations. Judicial interpretation has added the limitation that no city may exercise police jurisdiction over the territory embraced by the corporate limits or police jurisdiction of another city or town.

8. Alabama Code, Tit. 37, §585, specifically grants a municipal recorder with judicial powers in the police jurisdiction.

9. Alabama Code, Tit. 37, §733, provides for the collection by a municipality of licenses from businesses located within the police jurisdiction.

10. Persons, such as the Plaintiffs, who live outside the limits of a municipality are not allowed to vote in city elections, or participate in or initiate referendum or recall elections.

11. The denial of the right to vote in city elections to persons in police jurisdictions infringes on their constitutional right (under the due process and equal protection clauses) to a voice in their government.

12. Because the police jurisdiction automatically changes when the municipal limits change, residents of unincorporated areas are often thrust into the police jurisdiction of a municipality without their permission and without regard to due process of law.

13. All, or nearly all, of the City of Northport is within three miles of the City of Tuscaloosa. Because the City of Tuscaloosa cannot exercise police jurisdiction over the City of Northport, the residents of the Holt community are denied equal protection of the laws in that they are governed by the City of Tuscaloosa while other citizens who stand in the same political and gerographical [sic] relationship to the City of Tuscaloosa are not so governed. Other members of the class face the same problem if they live in an area in which two or more municipalities are close together; for example in the Mobile, Pritchard, or Chickasaw police jurisdictions.

13A. Members of the class of Plaintiffs, including Clyde Jones have been required to purchase business licenses to engage in business within the police jurisdiction.

13B. Members of the class of Plaintiffs, including Clyde Jones and Donald E. Lankford have been required to purchase building permits from the City of Tuscaloosa and submit to inspections of buildings within the police jurisdiction.

13C. Members of the class of Plaintiffs, including Clyde Jones, Roy W. Johnson, Donald E. Lankford, and Herbert Flora, have been required to pay a Tuscaloosa city tax on cigarettes bought within the police jurisdiction.

13D. Members of the class of Plaintiffs, including Roy W. Johnson, have been required to pay a Tuscaloosa city tax on packaged beer bought within the police jurisdiction.

13E. Members of the class of Plaintiffs, including Roy W. Johnson, have been required to pay a higher price on wine or liquor bought for on-premises consumption because of a tax imposed by the City of Tuscaloosa on retailers of wine and liquor in the police jurisdiction.

14. [Deleted]

15. [Deleted]

16. Alabama law requires a taxpayer to receive a rebate of taxes illegally collected only if the taxes were paid under protest. This court has no jurisdiction to enjoin the collection of state or local taxes, but the decision of this suit will affect the legality of such taxes. Therefore, the Plaintiffs request that all taxes, fees, or licenses paid to a municipality by persons in the police jurisdiction be considered to have been paid under protest. Such an order would have no adverse effect upon the Defendants but would preserve the rights of Plaintiffs' class to claim rebates of taxes if they obtain a favorable decision from this court.

RELIEF

WHEREFORE, THE PREMISES CONSIDERED, the Plaintiffs pray this Court to grant the following relief:

A. Certify both the Plantiffs [sic] and Defendants as proper representatives of their respective classes.

B. Convene a three-judge district court to hear this action.

C. Declare Alabama Code, Tit. 37, §9, to be unconstitutional and enjoin its enforcement or implementation.

D. Declare Alabama Code, Tit. 37, §§585 and 733 to be unconstitutional insofar as they allow the exercise of any municipal power outside the limits of a municipality and enjoin their enforcement or implementation to that extent.

E. Grant a preliminary injunction requiring each member of the Defendant class to consider and hold that all taxes, licenses, and fees collected from persons residing within their respective police jurisdiction on account of activities or conduct in the police jurisdiction were paid under protest of the persons as to the constitutionality of collecting such tax, license, or fee; provided however, that no notice of such consideration of protest shall be required from any party and further provided that this injunction shall not affect the applicable statute of limitations.

F. [Deleted]

G. Grant the Plaintiffs their costs, including a reasonable attorney's fee.

H. Grant such other, further, and different relief as the premises may demand.

Submitted by,

s/ W. E. Still

Drake, Knowles and Still
P. O. Box DK
University, Alabama 35486
ATTORNEYS FOR PLAINTIFFS

(Certificate of Service Omitted in Printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION
(Convened Pursuant to 28 U.S.C. Sec. 2281)

(Title Omitted in Printing)	)	[Filed April 8, 1976]
	)	
	)	C.A. 73-M-736

MOTION TO DISMISS

Come now the Defendants and move the Court to dismiss the complaint in this cause on the following grounds:

1. That Title 28 U.S.C. Section 1341 prohibits the Court from asserting jurisdiction of statutes or ordinances providing for the purchase of business licenses, building permits or other types of fees or assessments prescribed pursuant to ordinance.

2. That the complaint alleges neither facts showing a case or controversy nor facts showing a justiciable controversy for declaratory relief other than facts setting up controversies in regard to statutes providing for the levying of taxes or fees which come within the influence of the Tax Injunction

Act of 1937, (Title 28 U.S.C. Section 1341).

3. The complaint fails to state a claim upon which relief can be granted since the allegations of the complaint raise no substantial federal or constitutional question.

s/ J. Wagner Finnell
J. Wagner Finnell
Attorney for Defendants
P.O. Box 2089
Tuscaloosa, Alabama 35401

s/ Glenn N. Baxter
Glenn N. Baxter
Attorney for Defendants
P.O. Box 2089
Tuscaloosa, Alabama 35401

(Certificate of Service Omitted in Printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

(Title Omitted in Printing)) C.A. 73-M-736
)
) Interrogatories Filed
) August 15, 1973
)
) Answers Filed September
) 26, 1973

INTERROGATORIES

Plaintiffs hereby submit the following interrogatories to be answered in accordance with Rule 33, Federal Rules of Civil Procedure.

In these interrogatories, "police jurisdiction" shall mean the territory within three miles of the city limits, outside the city limits, and not within the limits or police jurisdiction of another city.

* * *

[Interrogatory No. 2]

2. Please list the type, rate, and statutory or ordinance authority for each tax, license, fee, or other involuntary contribution collected from residents or businesses located in the police jurisdiction of the City of Tuscaloosa, but outside its limits.

[Answer No. 2]

2. Licenses on businesses conducted in the Police Jurisdiction and outside of the Corporate Limits of the City are set out in

Chapter 3 of Articles II and III, and in Chapter 20 of the Code of Tuscaloosa.

The charge for such licenses or permits are set out in Chapter 20 of said Code and is specified in particular in Section 20-5.

Building inspection fees are set out in Section 10-25 of the Code of Tuscaloosa, the fee being based on the value for cost of the proposed structure.

Electrical inspection fees, as set out in the National Electrical Code, 1971 Edition, and the administrative regulations published therewith, adopted by Section 13-3 of the Code of Tuscaloosa. Fees are based on the number of outlets required to be inspected and the type of electrical installations.

Plumbing inspection fees are set out in Section F. of the Plumbing Code of Tuscaloosa, adopted by Section 25-1 of the Code of Tuscaloosa, and are based on the number of fixtures and type of installations required to be inspected.

Gas fitters inspection fees are set out in Section 25-20 of the Code of Tuscaloosa, and are based on the number of outlets installed and required to be inspected.

* * *

[Interrogatory No. 5]

5. What was the aggregate amount of each license, fee, or tax collected by the City of Tuscaloosa in the last complete fiscal year? What portion of each tax was collected in the police jurisdiction?

[Answer No. 5]

5. Aggregate amount of each license, fee or tax collected by the City of Tuscaloosa in the last fiscal year, together with the portion collected in the Police Jurisdiction and outside of the Corporate Limits, where known, is as follows:

License

Total Privilege License - $ 1,152,265. Of this $ 27,985.69 was collected in Police Jurisdiction, or .036% [sic, 2.4%] according to best estimates.

Cigarette Tax - $ 341,131.00. Of this amount $ 3,615.99, or .011% [sic, 1.05%], collected in Police Jurisdiction.

Lodging Tax - $ 18,509.00. Of this amount $ 3,625.24 was collected in Police Jurisdiction.

Beer Tax - $ 36,112.94. Of this amount $ 5,304.77 was collected in Police Jurisdiction.

Inspection Fees - $ 108,418.00. Of this $ 27,104.50 was collected from

Police Jurisdiction.
(Year, September 1972 - August 31, 1973).

* * *

[Interrogatory No. 7]

7. Do residents or businesses in the police jurisdiction receive fire protection by the City of Tuscaloosa fire department on an equal basis with residents and businesses in the City? Must they pay a fee for such protection or post a bond to guarantee such a fee?

[Answer No. 7]

7. All businesses or persons paying a privilege license outside of the City and within the Police Jurisdiction received the same fire protection without cost that is afforded to persons living within the Corporate Limits.

Those persons residing outside of the Corporate Limits who do not pay a privilege license or municipal tax are required to pay, or promise to pay, a fee for fire protection services.

* * *

[Interrogatory No. 9]

9. Has any estimate been made by the city planning department, West Alabama Planning and Development Agency, or a similar

organization as to the number of people located within Tuscaloosa's police jurisdiction? If so, what was the estimate, when was it made, and upon what basis was it made?

[Answer No. 9]

9. An estimate prepared by the Tuscaloosa Planning Department is attached hereto as Exhibit "A".

[Exhibit "A"]

MEMO FROM PLANNING DIRECTOR TO CITY ATTORNEY

September 17, 1973

9. The following estimate of the number of persons living within Tuscaloosa police jurisdiction was prepared by the Tuscaloosa City Planning Department in September, 1973, and was based upon 1970 Census Data as reported in Department of Commerce publication PHC (1) - 220, Census Tracts-Tuscaloosa, Alabama Standard Metropolitan Statistical Area:

Total population for Tuscaloosa County was reported as 116,029, of which 65,773 resided in the City of Tuscaloosa and 9,435 resided in the City of Northport. This left a net population of 40,821 in unincorporated areas of the county. The problem is to determine how many of these 40,821 people lived in Tuscaloosa's police jurisdiction. The enclosed map shows the extent of this

jurisdiction. Unfortunately, census tract boundaries used in the 1970 Census do not coincide in any way with this police jurisdiction boundary. Certain tracts do, however, encompass the most heavily populated portions of the police jurisdiction, including Holt and most of Cottondale. This area is delineated by a green line on the attached map, and includes the unincorporated portions of the following census tracts: 105, 108, 117, 123, and 124. The population contained in these tracts (unincorporated portions only) is recapitulated as follows:

Tract	105	3,155
	108	4,897
	117	1,453
	123	1,157
	124	2,325
	Total	12,987

The only means available to determine the number of persons outside these tracts (depicted by the green line), but within the police jurisdiction (depicted by the red line) is to estimate this figure, based upon aerial photography and the staff's personal acquaintance with the area. By this means, the staff estimates the population in the remainder of the police jurisdiction at between 3,000 and 4,000 persons. When this estimate is added to the 12,987 persons previously counted, one arrives at a grand total of about

16,000 - 17,000 for the population of Tuscaloosa's police jurisdiction. This figure does not seem unreasonable when checked against the total unincorporated population of 40,821 in the entire county. Accordingly, the staff believes that the above estimate is realistic.

s/ Alvin P. DuPont
Alvin P. DuPont
PLANNING DIRECTOR

* * *

[Interrogatory No. 11]

11. In your opinion, what useful purpose for the city is served by the existence of the police jurisdiction?

[Answer No. 11]

11. The Police Jurisdiction, as stated by various courts for over one hundred years, and regulations therein are necessary for the protection of lives, health and property of the citizens, the maintenance of good order and quiet of the community, and the preservation of public morals.

In the relative short span of twenty-six (26) years, the City of Tuscaloosa has grown from an area of 6.05 square miles to 34.23 square miles. If the City had failed to enforce its building codes and subdivision regulations within its Police Jurisdiction, there would have been annexed areas replete with substandard structures, defective streets,

and poorly platted subdivisions. Even without considering expansion of the Corporate Limits, we believe the enforcement of municipally adopted regulations within the Police Jurisdiction are justified in terms of its beneficial affect on the qualify of development and, ultimately, the quality of life throughout the metropolitan area. Although fees are charged for the issuance of building permits and the processing of subdivision plats, these fees do not nearly meet the budgetary requirements for these services. The City is, in effect, subsidizing this expense in the interest of the orderly development of the metropolitan area.

The City has no zoning authority outside its Corporate Limits, and this has led to some disorderly development and numerous appeals from citizens living in the Police Jurisdiction for protection against the encroachment of incompatible and noxious land uses adjacent to and near their homes.

In the past several years, the areas subject to the most rapid development are those areas surrounding any municipality. In our opinion, it is certainly necessary for the protection of lives, health, and property of the citizens, and the maintenance of good order and public morale, that this rapidly developing area be subject to some

sort of regulation that is given and has been given for hundreds of years to municipalities in the State of Alabama, and many other states. A City can only exercise those authorities granted to it by the Sovereign State of which all of the residents of the City, as well as residents of its Police Jurisdiction, comprise a part.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

(Title Omitted in Printing.)) [Interrogatories Filed May 13, 1974]
) [Answers Filed June 6, 1974]
)
) CA. 73-M-736

SECOND INTERROGATORIES TO DEFENDANT

Plaintiffs hereby submit the following interrogatories to Defendant to be answered in accordance with Rule 33 of the Rules of Civil Procedure. In the interrogatories, "police jurisdiction" shall mean the territory within three miles of the city limits of Tuscaloosa, outside the city limits, and not within the limits or police jurisdiction of another city.

* * *

[Interrogatory No. 5]

Please indicate the name, number of members, tenure, and duties of each board, commission, committee, advisory group or the like appointed by the City Commission or any of its members. For each board, etc., indicate whether any person now serving on such board or who has served on such board within the last ten (10) years was during his/her tenure on such board a non-resident of the City of Tuscaloosa.

[Answer No. 5]

The information called for in this interrogatory is attached hereto as Appendix "A" and by reference incorporated in and made a part hereof.

* * *

[See next page for Appendix "A".]

Appended hereto as Appendix "A" is a list of each Board or Committee, either appointed by the Commission Board of Tuscaloosa or to which certain members are appointed by the Commission Board of Tuscaloosa.

Where an asterisk appears opposite the name of an individual, then that individual resides outside of the Corporate Limits of the City of Tuscaloosa.

ALABAMA JOBS FOR VETERANS TASK FORCE COMMITTEE.

(Appointed May 18, 1971)

Herschel Foster
Kenneth Tucker
Jim Kisgen

(To serve at the pleasure of the Commission Board.)

AREA TRANSPORTATION STUDY
TECHNICAL COORDINATING COMMITTEE

Alvin P. DuPont	E.T. Miller
J. Wagner Finnell	R.A. Cardinal, Jr.
Winston Morris	E.G. Besant
George F. Lamb	Paul Meadows*
B.J. Kemp	Lawrence R. Smith
Gil Frye*	John Skinner*
Gayle Mitchum*	Jimmy Watson
George S. Lawson	Joe Wilkerson*
Tim Parker*	Harvey Edwards, Jr.
Warren Keith	Lewis E. McCray

(Date of expiration of terms not known.)

CHARITABLE SOLICITATIONS COMMITTEE

(Appointed May 18, 1971 - Ordinance No. 1672)

Name	Term Expires
Dr. Elbert Sparks	May, 1973
Mrs. Ed Ashton	May, 1973
O.W. Stokes	May, 1973
William A. Tate	May, 1974
Walter Oliver	May, 1974
M.T. Ormond	May, 1975
Ronnie Rhodes	May, 1975

CIVIL SERVICE BOARD
(Appointed by Governor)

Name	Term Expires
Sam M. Phelps	1973
Walter B. Lawson	1975
J. Paul Kuykendall	1977

COMMUNITY DEVELOPMENT ACTION COMMITTEE
(Appointed October 5, 1972)

Aaron D. Harris	Jerry Belk
Hugh Stegall	William Marable
A.C. Mullins	B.B. Crosby
Alvin P. DuPont	Joe Mallisham
W.D. Lawley	Ed Rutledge

(Date of expiration of terms not known)

DRUID CITY HOSPITAL BOARD

Name	Term Expires
Chris Kyle	October 31, 1975
Cliff Armstrong	October 31, 1975

TUSCALOOSA CITY BOARD OF EDUCATION

Name	5-year term expiration
Mrs. Charles A. Scott	April, 1977
Dr. W.N. Dansby	April, 1978
Vernon R. Wilson	April, 1974
Thomas E. Snow	April, 1975
Claud A. Morrison	April, 1976

ELECTRICAL EXAMINING BOARD

(Appointed May 1, 1970)

Name	Term Expires
Benny Ramey	May 1, 1976
James Lancaster*	May 1, 1976
Bob Nowlin	May 1, 1976
Wilburn J. Sample (Appointed 11/17/70)	May 1, 1976

FRIEDMAN HOME BOARD

Name	Term Expires
Miss Esther R. Lustig	Sept. 22, 1968
N.C. Morgan	Sept. 22, 1968
Willis Penfield	Sept. 22, 1968
Mrs. Leslie Dee	Sept. 22, 1969
Paul Guthrie	Sept. 22, 1969
Mrs. Madge Poole	Sept. 22, 1969
Matt Clinton*	Sept. 22, 1970
Mrs. Bernice J. Ehlert	Sept. 22, 1970
Guergen Paepcke	Sept. 22, 1970
Mrs. Lucille C. Sconyers	Sept. 22, 1970
Jake Termerson	Sept. 22, 1970

GREATER TUSCALOOSA PUBLIC STUDY COMMISSION

Jessie L. Anderson	William H. "Bill" Lanford
Fred Baker	George A. LeMaistre
H.B. Barton	Lewis M. Manderson, Jr.
Joe A. Brown	Frank M. Moody
Russell Chappell*	Joe T. Phifer
John C. Duckworth, Jr.	Dwight M. Richardson
T. Gary Fitts	Frank A. Rittenberry
James D. Geer	G. Gragg Robinson
C.A. Fredd, Sr.	W. Aaron Waldrop*
C.J. Hartley	Nora Weaver*
Tennis C. Jackson	Vernon R. Wilson
Daniel G. "Danny" Jones	

(Dates of expiration of terms not known)

INDUSTRIAL DEVELOPMENT BOARD

Name	Term Expires
W. Tandy Barrett	April 1, 1974
Frank M. Moody	April 1, 1974
James E. Money	April 1, 1974
David M. Cochrane	April 1, 1974
Morris Sokol	April 1, 1974
Ernest Williams	April 1, 1974
Dexter D. Hulsart	April 1, 1974
Albert Baernstein	April 1, 1976
Cecil Carver	April 1, 1976
Tom Birdsong	April 1, 1976
A. Clayton Rogers	April 1, 1976
Lawrence R. Smith	April 1, 1976
J.C. Duckworth	April 1, 1976
Aubrey Dominick	April 1, 1978
George Shirley	April 1, 1978
Harry H. Pritchett	April 1, 1978
David G. McGiffert	April 1, 1978
K. Gordan Lawless	April 1, 1978
C.D. Davenport*	April 1, 1978
George LeMaistre*	April 1, 1978
H. Vann Waldrop	
C.J. Hartley	

TUSCALOOSA COUNTY PARK & RECREATION AUTHORITY

Name	Term Expires
Emmett Dendy	November, 1976
Dr. H.W. Savery	November, 1974
Morris Sokol	November, 1975

TUSCALOOSA CITY PLANNING COMMISSION
(6-Year Terms)

Name	Term Expires
Roy Madison	August 1, 1975
William J. Strickland	August 1, 1976
Bruce West	August 1, 1977
Jimmy Watson	August 1, 1978
Warren Keigh	August 1, 1975
Charles A. Snyder	August 1, 1979

C. Snow Hinton	September 30, 1977
C. Delaine Mountain	September 30, 1977
Hilliard Fletcher	September 30, 1977

TUSCALOOSA HOUSING AUTHORITY

Name	Term Expires
Frank M. Moody	March 17, 1970
Dr. Harold Stinson	March 17, 1971
R.H. McConnell	March 17, 1972
Rufus Bealle	March 17, 1973
W. Tandy Barrett	March 17, 1974

TUSCALOOSA COUNTY SPECIAL TAX BOARD

Name	Term Expires
County - Parker Mackey	Jan. 1, 1974
City - Hilliard Fletcher	Jan. 1, 1974
County Bd. of Educ. - Marshall Walker *	Jan. 1, 1974
City Bd. of Educ. - Tom Snow	Jan. 1, 1974
Druid City Hosp. - Henry Hale	Jan. 1, 1974

TUSCALOOSA HISTORICAL - PRESERVATION AUTHORITY
(Appointed May 7, 1970)

Judge John M. Puryear	Marvin Harper
Lewis McCray	Clemson Duckworth
Mrs. James Boone	Jack Warner
Joe Roland	Jim Fitts

ZONING BOARD OF ADJUSTMENT

Name	Term Expires
Gordon Lawless, Chairman	July 28, 1976
Joe Phifer	July 28, 1975
Gary Fitts	July 28, 1976
C.R. Jamison	July 28, 1975
Leroy McAbee	July 28, 1974

Supernumerary Members

William O'Connor	July 28, 1974
Gerald Busby	July 28, 1974

PLUMBING EXAMINING BOARD

John Carlton Dill
W.J. Moses
J.B. Tierce
Ralph Kelley
W.D. Lawley

In general, the duties of each said Board or Committee are as follows:

ALABAMA JOBS FOR VETERANS TASK FORCE COMMITTEE: To make recommendations and studies which will result in additional employment of Veterans in the public and private sector of the City.

AREA TRANSPORTATION STUDY TECHNICAL COORDINATING COMMITTEE:

To establish the planning process and adopt a recommended Transportation plan in coordination with the Alabama Highway Department for the City of Tuscaloosa and Tuscaloosa County.

CHARITABLE SOLICITATIONS COMMITTEE:

Duties are assigned by Ordinance No. 1672, which appears in the Code of Tuscaloosa.

CIVIL SERVICE BOARD OF TUSCALOOSA: Duties are prescribed in Act No. 246 of the Local

Acts of Alabama of 1947 Legislature.

COMMUNITY DEVELOPMENT ACTION COMMITTEE: To advise and assist the governing body in all phases of community development, including health, public safety, recreation and distribution of revenue sharing funds.

DRUID CITY HOSPITAL BOARD: Duty prescribed by applicable law of State Legislature setting up Board.

TUSCALOOSA CITY BOARD OF EDUCATION: Perform the duties of a City Board of Education as prescribed by State Law.

ELECTRICAL EXAMINING BOARD: To make recommendations in regard to the Electrical Code of Tuscaloosa, and to conduct examinations for certifying electricians.

FRIEDMAN HOME BOARD: To serve in the preservation and development of the Friedman Home; to supervise the use of the property as well as the furnishing, equipping, and upkeep of the same.

GREATER TUSCALOOSA PUBLIC STUDY COMMISSION: To make recommendations to the Commission Board as to the orderly development, expansion, and growth of the municipality, and recommendations for the betterment in the quality of life in the City of Tuscaloosa and the Greater Tuscaloosa area.

INDUSTRIAL DEVELOPMENT BOARD: To perform the duties of industrial development pursuant to the provisions of the Wallace and Cater Acts of the State of Alabama.

TUSCALOOSA COUNTY PARK AND RECREATION AUTHORITY: The City furnishes members of this authority, others being appointed by Tuscaloosa County Commission and City of Northport. Duties as prescribed by State Law include the furnishing of public recreation to all citizens of Tuscaloosa County.

TUSCALOOSA CITY PLANNING COMMISSION: To supervise zoning within the Corporate Limits and the orderly development of subdivisions and Master Plans for development for the City of Tuscaloosa and the area in its Police Jurisdiction.

TUSCALOOSA HOUSING AUTHORITY: Administer public housing as provided by law.

TUSCALOOSA COUNTY SPECIAL TAX BOARD: The City furnishes one member of this Board to administer County-wide sales tax.

TUSCALOOSA HISTORICAL PRESERVATION AUTHORITY: Duties prescribed by State Law to foster and preserve sites of historic value in the City and County.

ZONING BOARD OF ADJUSTMENT: To hear and pass on requests for variances to the Zoning Ordinance of the City of Tuscaloosa within its Corporate Limits.

PLUMBING EXAMINING BOARD: To make recommendations as to ordinances to be included in the Plumbing Code and to conduct examinations to determine the qualification and certification of qualified or certified plumbers.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

(Title Omitted in Printing)	)	[Interrogatories Filed January 29, 1976]
	)	[Answers Filed March 28, 1978]
	)	
	)	CA 73-M-736

PLAINTIFFS' THIRD INTERROGATORIES

Plaintiffs present the following interrogatories to be answered in complaince with Civil Rule 33.

1. What was the aggregate amount of each license, fee, or tax collected by the City of Tuscaloosa in the fiscal years 1974 and 1975? What portion of each tax was collected in the police jurisdiction?

[Answer No. 1]

1. For the year 1975 the aggregate of each license and the amount collected in the police jurisdiction is as follows:

Type of License	Total	Police Jurisdiction
General business license	$1,618,042	$39,907
License Tax - Beer	108,150	9,161
License Tax - Liquor	54,316	9,491
License Tax - Lodging	26,037	2,974
License Tax - Cigarettes	388,696	58,869

(The cigarette license tax is estimated based on the sale of either 5¢ of 2.5¢ stamps and may be inaccurate since a dealer may use two 2.5¢ stamps instead of the 5¢ stamp.)

For the tax year 1974:

Type of license	Total	Police Jurisdiction
General business	$1,541,312	
License Tax - Beer	21,000	
License Tax - Liquor	3,265	
License Tax - Lodging	21,381	
License Tax - Cigarettes	371,189	

Our records do not reflect the exact amount of sales in the police jurisdiction, but using the same ratio for the general business license, we would estimate that $38,378.00 was collected from the police jurisdiction. On the cigarette tax we estimate that $37.118.90 was collected in the police jurisdiction. On the lodging tax we estimate that $1,069.05 was collected in the police jurisdiction.

Estimates on beer tax and liquor tax are not made and not available for the year 1974.

Our building permit fees for the year 1974 (calendar year):

TOTAL: $97,689.72

POLICE JURISDICTION: $10,394.62

1975 (calendar year)

TOTAL: $108,230.81

POLICE JURISDICTION: $10,917.32

Garbage collection fees:

TOTAL - 1974: $713,204.00

TOTAL - 1975: $1,054,369.00

(No collection in police jurisdiction)

Milk inspection fees:

TOTAL - 1974; $6,000.00

TOTAL - 1975: 6,000.00

(No collection in police jurisdiction)

* * *

[Interrogatory No. 3]

3. Please supplement your response to Question 5 of Plaintiffs' Second Interrogatories to Defendant by bringing each list up to date.

[Answer No. 3]

3. See attached list.

[The following is the list referred to in Answer No. 3.]

Appended hereto as Appendix "A" is a list of each Board or Committee, either appointed by the Commission Board of Tuscaloosa or to which certain members are appointed by the Commission Board of Tuscaloosa.

Where an asterisk appears opposite the name of an individual, then that individual

resides outside of the Corporate Limits of the City of Tuscaloosa.

ALABAMA JOBS FOR VETERANS TASK FORCE COMMITTEE

(Appointed May 18, 1971)

Herschel Foster
Kenneth Tucker
Jim Kisgen

(To serve at the pleasure of the Commission Board.)

AREA TRANSPORTATION STUDY TECHNICAL COORDINATING COMMITTEE

Alvin P. DuPont	E.T. Miller
Winston Morris	R.A. Cardinal, Jr.
J. Wagner Finnell	E.G. Besant
George F. Lamb	Paul Meadows*
B.J. Kemp	Lawrence R. Smith
Gil Frye*	John Skinner*
Gayle Mitchum*	Jimmy Watson
George S. Lawson	Joe Wilkerson*
Tim Parker*	Harvey Edwards, Jr.
Warren Keith	Lewis E. McCray

(Date of expiration of terms not known.)

CHARITABLE SOLICITATIONS COMMITTEE
(Appointed May 18, 1971 - Ordinance No. 1672)

Name	Term Expires
Dr. Elbert Sparks	May, 1976
Mrs. Oviatt Bowers	May, 1978
Harlan C. Meredith	May, 1978
William A. Tate, Chairman	May, 1977
Walter Oliver	May, 1977
Ronnie Rhodes	May, 1978
Richard Hackendahe	May, 1976

CIVIL SERVICE BOARD

(Appointed by Governor)

Name	Term Expires
Sam M. Phelps	1979
Walter B. Lawson	1981
J. Paul Kuykendall	1977

COMMUNITY DEVELOPMENT ACTION COMMITTEE
(Appointed October 5, 1972)

Aaron D. Harris	Jerry Belk
Hugh Stegall	William Marable
A.C. Mullins	B.B. Crosby
Alvin P. DuPont	Joe Mallisham
W.D. Lawley	Ed Rutledge

(Date of expiration of terms not known.)

DRUID CITY HOSPITAL BOARD

Name	Term Expires
Chris Kyle (Reappointed 3/16/76)	October 31, 1978
Lloyd Wood (Appointed 3/16/76	October 31, 1978

TUSCALOOSA CITY BOARD OF EDUCATION

Name	5-year term expiration
Mrs. Charles A. Scott	April, 1977
Dr. W.N. Dansby	April, 1978
Vernon R. Wilson	April, 1979
Claud A. Morrison	April, 1976
Mrs. Emily Barrett	April, 1979
John Hogue	April, 1979
William H. Lawford	April, 1980

ELECTRICAL EXAMINING BOARD
(Appointed May 1, 1970)

Name	Term Expires
Benny Ramey	May 1, 1976
James Lancaster*	May 1, 1976
Bob Nowlin	May 1, 1976
Wilburn J. Sample (Appointed 11/17/70)	May 1, 1976

FRIEDMAN HOME BOARD

Name	Term Expires
Miss Esther R. Lustig	Sept. 22, 1968
N.C. Morgan	Sept. 22, 1968
Willis Penfield	Sept. 22, 1968
Mrs. Leslie Dee	Sept. 22, 1969
Paul Guthrie	Sept. 22, 1969
Mrs. Madge Poole	Sept. 22, 1969
Matt Clinton*	Sept. 22, 1970
Mrs. Bernice J. Ehlert	Sept. 22, 1970
Guergen Paepcke	Sept. 22, 1970
Mrs. Lucille C. Sconyers	Sept. 22, 1970
Jake Temerson	Sept. 22, 1970

GREATER TUSCALOOSA PUBLIC STUDY COMMISSION

Jessie L. Anderson
Fred Baker
H.B. Barton
Joe A. Brown
Russell Chappell*
John C. Duckworth, Jr.
T. Gary Fitts
James D. Geer
C.A. Fredd, Sr.
C.J. Hartley
Tennis C. Jackson
Daniel G. "Danny" Jones
William H. "Bill" Lanford
Lewis M. Manderson, Jr.
Frank M. Moody
Joe T. Phifer
Dwight M. Richardson
Frank A. Rittenberry
G. Gragg Robinson
W. Aaron Waldrop*
Nora Weaver
Vernon R. Wilson

(Date of expiration of terms not known)

INDUSTRIAL DEVELOPMENT BOARD

Name	Term Expires
W. Tandy Barrett	April 1, 1980
Frank M. Moody	April 1, 1980
James E. Money	April 1, 1980
Morris Sokol	April 1, 1980
Ernest Williams	April 1, 1980
Albert Baernstein	April 1, 1976
Cecil Carver	April 1, 1976
Tom Birdsong	April 1, 1976
A. Clayton Rogers	April 1, 1976
Aubrey Dominick	April 1, 1978
K. Gordon Lawless	April 1, 1978
H. Vann Waldrop	April 1, 1978

TUSCALOOSA COUNTY PARK & RECREATION AUTHORITY

Name	Term Expires
Emmett Dendy	November, 1976
Morris Sokol	November, 1978
Mrs. Willie B. Palmer	November, 1977

TUSCALOOSA CITY PLANNING COMMISSION
(6-Year Terms)

Name	Term Expires
Roy Madison	August 1, 1975
William J. Strickland	August 1, 1976
Bruce West	August 1, 1977
Jimmy Watson	August 1, 1978
Warren Keith	August 1, 1975
C. Snow Hinton	September 30, 1977
C. Delaine Mountain	September 30, 1977
Hilliard Fletcher	September 30, 1977
Thomas Jefferson	August 1, 1979

TUSCALOOSA HOUSING AUTHORITY

Name	Term Expires
Dr. Harold Stinson	March 15, 1971
R.H. McConnell	March 15, 1972
Rufus Bealle	March 15, 1973
Harold G. McAbee	March 15, 1979
James E. Albright	December 23, 1980

TUSCALOOSA COUNTY SPECIAL TAX BOARD

Name	Term Expires
County-Parker Mackey	January 1, 1978
City-Hilliard Fletcher	January 1, 1978
County Bd. of Educ. - Marshall Walker*	January 1, 1978
City Bd. of Educ. - John Hogue	January 1, 1978
Druid City Hosp. - Leslie Smith	January 1, 1978

TUSCALOOSA HISTORICAL-PRESERVATION AUTHORITY
(Appointed May 7, 1970)

Judge John M. Puryear (until succeeded)	Marvin Harper (until succeeded)
Lewis McCray (until succeeded)	Clemson Duckworth (January 1, 1975)
Mrs. James Boone (January 1, 1977)	Jack Warner (January 1, 1978)
Joe Roland (until succeeded)	Jim Fitts (January 1, 1976)

ZONING BOARD OF ADJUSTMENT

Name	Term Expires
Gordon Lawless, Chairman	July 28, 1976
Gary Fitts	July 28, 1976
Leroy McAbee	July 28, 1977
William P. Gray, Jr. (Joe Phifer)	July 28, 1978

Supernumerary Members

Sue Thompson	July 28, 1977
Gerald Busby	July 28, 1977

PLUMBING EXAMINING BOARD

John Carlton Dill	May 1, 1976
Q.J. Moses	May 1, 1976
J.B. Tierce	May 1, 1976
Ralph Kelley	May 1, 1976
W.D. Lawley	May 1, 1976

[The balance of answer, being a description of the duties of each Board or Committee, is identical to the description in Defendants' Answer No. 5 to the Second Interrogatories of Plaintiffs, supra, at 29.]

* * *

[Interrogatory No. 5]

5. During the fiscal years 1973, 1974, and 1975, what was the total number of building permits issued by the City of Tuscaloosa? How many of these were for buildings then located in the police jurisdiction?

[Answer No. 5]

5. Total number of building permits issued by the City of Tuscaloosa were as follows:

	TOTAL	POLICE JURISDICTION
Calendar year 1973	1,091	130
Calendar year 1974	804	129
Calendar year 1975	1,021	153

* * *

OPINION OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
June 7, 1977

This opinion is found in the jurisdictional statement appendix beginning at page 1a.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

(Title Omitted in Printing)	)	[Filed June 17, 1977]
	)	CA 73-M-736

PLAINTIFFS' MOTION TO RECONSIDER

Come now the plaintiffs and move the Court to reconsider its judgment dismissing the equal protection and due process claims of plaintiffs and show the following grounds:

1. The Court noted that the present case is similar to Little Thunder v. South Dakota, 518 F.2d 1253 (8th Cir. 1975), except that the relief sought is different. Little Thunder plaintiffs and Holt plaintiffs complain of the same constitutional violation: governance by a popularly elected government that excludes them from the electorate. The Little Thunder plaintiffs asked the Court for one type of relief (that they be included in the electorate) while the Holt plaintiffs asked for a different type of relief (that the illegal government be withdrawn from them). The Little Thunder plaintiffs had little choice: if they asked to have the county government not govern them then they would

be left without government services. The Holt plaintiffs have no such problem: the absence of the Tuscaloosa city government will leave them under the sole control of the county government. This Court has erred by dismissing the plaintiffs' complaint.

2. The Court should allow the plaintiffs the option of amending their complaint to ask that they be allowed to participate in Tuscaloosa City elections, if this Court holds that that is the only relief they may seek. Floyd v. Trice, 490 F.2d 1154 (8th Cir. 1974).

3. The Court dismissed the due process claims but allowed the plaintiffs to amend their complaint to specify the ordinances which deny them due process. Plaintiffs contend that they are denied due process not by ordinances but by the passage of those ordinances by a government from which they are excluded and/or by their inclusion in the police jurisdiction at elections (which annex territory to the city) at which they are denied a vote.

4. The Court of Appeals found that the Complaint in this action presented a substantial question as to the validity of the statute under the Constitution. This Court has now dismissed the Complaint under a Rule 12(b)(6) motion to dismiss for failure to

state a claim. Plaintiffs aver that the "law of the case" is that the Complaint is sufficient.

SUBMITTED BY:

s/ Ed Still
Edward Still
601 Title Building
Birmingham, AL 35203
205/322-1695

* * *

OPINION OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
July 14, 1977

This opinion is found in the jurisdictional statement appendix beginning at page 4a.

* * *

IN THE SUPREME COURT
OF THE UNITED STATES

NO. 77-515

HOLT CIVIC CLUB, etc., et al.,

Appellants,

vs.

CITY OF TUSCALOOSA, etc., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA

MOTION TO AFFIRM

J. Wagner Finnell
P. O. Box 2089
Tuscaloosa, AL 35401

Attorney for Appellees

TABLE OF CONTENTS

MOTION TO AFFIRM

Appellees respectfully submit that the Order of the Three-Judge District Court, granting the Defendants' Motion to Dismiss, with leave to the Plaintiffs to further amend etc., should be affirmed.

The facts upon which the law in this case must be predicated are set out in the Plaintiffs' (Appellants') complaint which, for convenience is reproduced herein as Exhibit "A".

Defendants' Motion to Dismiss, addressed to the complaint, is set out herein as Exhibit "B".

ARGUMENT

The complaint in this case fails to allege that the Plaintiffs have suffered injury or damage, or have been threatened with injury or damage, because of the enforcement of any ordinance or regulation of the City of Tuscaloosa effective outside of the Corporate Limits, other than allegations that certain Plaintiffs have been required to pay licenses or a higher price on wine or liquor (a license tax or fees). Title 28 USC Sec. 1341, (the Tax Injunction Act of 1937), withholds from the Federal Court jurisdiction to declare such ordinance ineffective through declaratory judgment,

and also withholds jurisdiction from the District Court to enjoin enforcement thereof.

No case or controversy or justiciable controversy is alleged which would warrant declaratory relief. Appellees believe that the allegations are not effective to vest jurisdiction in the District Court.

It is the Defendants' contention that a general sweeping attack on the right of a State to rest any extra-territorial jurisdiction in its municipalities, without any valid allegations of invidious classifications and, absent any allegations realistically stating an infringement of the constitutional guarantee of the right to vote, does not raise a substantial federal or constitutional question. At best, the complaint seems to raise the question as to whether or not a state enabling act is unconstitutional per se under Equal Protection or Due Process Clauses of the Constitution if the enabling act grants any vestige of extra-territorial regulation to the municipality.

We point out that there is no analogy between the facts alleged in this case and the facts as appearing in

Little Thunder v. South Dakota, 518 F. 2d 1253. (CA8, 1975).

Alabama follows the rule that "Municipalities are mere instrumentalities of the State, and possess only such powers as may have been delegated to them by the Legislature". City of Leeds v. Town of Moody, 294 Ala. 496, 319 So.2d 242 (1975). A city in Alabama may not zone extra-territorially. Roberson v. City of Montgomery, 285 Ala. 421, 233 So.2d 69 (1970). A city may not condemn lands or exercise the right of eminent domain outside of its corporate limits for public park purposes, or for any purpose not specifically granted to it by the State. City of Birmingham v. Brown, 241 Ala. 203, 2 So.2d 305 (1941). There is no authority granted to a city to tax outside of its corporate limits and the statute, set out as Section 733 of Title 37, at 8a, in the Appellants' jurisdictional statement, does not vest in the municipality any authority to tax outside of its corporate limits. It has long been the law of Alabama that a municipality could not charge a tax or license for revenue purposes outside the corporate limits, but that it could only make a reasonable charge in relation to the costs of services which were rendered.

The above section (Section 733) has been held by the Supreme Court of Alabama not to have altered this view of the law, but only acts as a limitation of the license to be charged. Alabama Gas Company v. City of Montgomery, 249 Ala. 257, 30 So. 2d 651 (1947). The city is given no right to close or control highways or roadways outside the corporate limits, nor is it given any right to operate or control or dictate the operation of a school or school systems lying outside of its corporate limits. It could hardly be said that the municipal governing body governs that area outside of the city.

We submit that there is no analogy between the facts alleged in this case and the voting rights cases. The facts alleged herein do not indicate that state power is being used as an instrument for circumventing a federally protected right. Gomillian v. Lightfoot, 364 U. S. 339, 5 L.Ed. 2d 110, 81 S.Ct. 125.

In this state, laws granting specific extra-territorial jurisdiction to municipalities in the area of police and sanitary regulations have existed for many years and it could hardly be said that such power was either vested or is used as

an instrument for circumventing a federally protected right. The State interest in this case is the orderly development and minimal control of the area sometimes called "suburbian areas" or "suburbia" immediately adjacent to the boundaries of the municipal corporation; areas which are or soon will be seeking incorporation in the city, seeking services in the nature of water and sewer, sanitation, police, fire, and health protection.

Surely the Court judicially knows that nearly every municipality is faced with the problem of granting services within its expanding boundaries and attempting to bring some order to the rapid and sometimes chaotic development in the area immediately surrounding the municipality. In addition, the State interest is concerned with the protection of the citizens within the muncipality from unwholesome, unhealthy and unlawful activities and developments immediately adjacent to its Corporate Limits.

The Supreme Courts of nearly every state in the Union have upheld the authorization to municipal corporations to exercise some sort of police power outside of their corporate

limits to further police and fire protection, the preservation of the public health, the control of airports, zoning regulations, and a multitude of other such regulations. McQuillin Municipal Corporations, 1969 Revised Volume 6, Section 2457.

This case has been before the District Court, has been to the Fifth Circuit, reversed on the sole ground that consideration by a Three-Judge panel was indicated under the law, considered and ruled upon by the Three-Judge panel and is now on appeal both to the Supreme Court of the United States and on delayed appeal again to the Fifth Circuit. Defendants earnestly request that the judgment of the District Court be affirmed and that the case by finally laid to rest.

SUBMITTED BY:

J. Wagner Finnell
P. O. Box 2089
Tuscaloosa, Alabama 35401
205/349-2010

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that, prior to or immediately after filing a copy of the foregoing with the Court, I mailed or delivered a copy of the foregoing to the following:

Mr. Edward Still
601 Title Building
Birmingham, Alabama 35203

Mr. Neil Bradley
52 Fairlie Street N. W.
Atlanta, Georgia 30303

DATE:

J. Wagner Finnell

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

HOLT CIVIC CLUB, an unincorporated association, on behalf of its members; Jimmy Clements, Clyde Jones, Herbert Flora, Joe Perkins, Sr., William Gordon, Victoria Harris, Roy Johnson, Donald Lankford, individually, as representative members of the Holt Civic Club, and on behalf of all others similarly situated,

PLAINTIFFS,

VS. C.A. No. 73-M-736

CITY OF TUSCALOOSA, a municipal corporation, on behalf of all other municipal corporations in the State of Alabama; C. SNOW HINTON, C. DELAINE MOUNTAIN, and HILLIARD FLETCHER, individually, as members of the Tuscaloosa City Commission and on behalf of all municipal executive officers and legislative bodies in Alabama; and GORDON ROSEN, individually, as City Recorder of Tuscaloosa, and on behalf of all other municipal judges in Alabama,

DEFENDANTS.

MOTION TO AMEND COMPLAINT

Come now the Plaintiffs and move to substitute this Amended Complaint for the Complaint as amended heretofore.

1. This action arises under the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution to the United States, and 42 U.S.C. S1983. Jurisdiction is vested in this Court by 28 U.S.C. SS1331, 1343, 2201, and 2281.

PLAINTIFFS

2. The Holt Civic Club is an unincorporated association of residents of the Holt community in Tuscaloosa County who have joined together to promote the best interests of the Holt community. The Holt Civic Club through the members listed sues on behalf of its members, under the authority of FRCP 23.2.

3. The individual Plaintiffs, Jimmy Clements, Clyde Jones, Herbert Flora, Joe Perkins, Sr., William Gordon, Victoria Harris, Roy Johnson and Donald Lankford, are each (1) members of the Holt Civic Club; (2) residents of Tuscaloosa County, Alabama; (3) residents of the Holt community

living outside the City of Tuscaloosa but within three miles of said city.

4. The named individual Plaintiffs are representative of the class of residents of Alabama who live outside any incorporated municipality but within the "police jurisdiction" of a city or town. These individuals meet the requirements of Rule 23(a) of the FRCP and this action may be maintained as a class action under paragraph (b) (1) or (b) (2) of said Rule.

DEFENDANTS

5. (Deleted)

6. The City of Tuscaloosa is a municipal corporation organized and operating under the laws of the State of Alabama. C. Snow Hinton, C. Delaine Mountain, and Hilliard Fletcher are the City Commission of Tuscaloosa and therefore combine the legislative and executive functions. Gordon Rosen is the City Recorder for Tuscaloosa and is charged with the duty of judicially administering the ordinances of Tuscaloosa. The City of Tuscaloosa and each named Defendant are sued as

representatives of all municipalities, all municipal executives, all municipal legislative bodies, and all municipal judicial officials in the State of Alabama. The prerequisities and requirements of Federal Rules of Civil Procedure 23 (a) and (b) (1) or (b) (2) have been met.

FACTS AND CAUSES OF ACTION

7. Alabama Code, Tit. 37, S9, provides that municipalities of six thousand or more inhabitants shall have a police jurisdiction of three (3) miles from its city limits while smaller municipalities shall have a one and a half (1.5) mile police jurisdiction. Police jurisdiction is defined by that section as the area within which the municipality may enforce police or sanitary regulations. Judicial interpretation has added the limitation that no city may exercise police jurisdiction over the territory embraced by the corporate limits or police jurisdiction of another city or town.

8. Alabama Code, Tit. 37, S585, specifically grants a municipal recorder with judicial powers in the police jurisdiction.

9. Alabama Code, Tit. 37, S733, provides for the

collection by a municipality of licenses from businesses located within the police jurisdiction.

10. Persons, such as the Plaintiffs, who live outside the limits of a municipality are not allowed to vote in city elections, or participate in or initiate referendum or recall elections.

11. The denial of the right to vote in city elections to persons in police jurisdictions infringes on their constitutional right (under the due process and equal protection clauses) to a voice in their government.

12. Because the police jurisdiction automatically changes when the municipal limits change, residents of unincorporated areas are often thrust into the police jurisdiction of a municipality without their permission and without regard to due process of law.

13. All, or nearly all, of the City of Northport is within three miles of the City of Tuscaloosa. Because the City of Tuscaloosa cannot exercise police jurisdiction over the City of Northport, the residents of the Holt community are denied equal protection of the laws in that they are

governed by the City of Tuscaloosa while other citizens who stand in the same political and georgraphical relationship to the City of Tuscaloosa are not so governed. Other members of the class face the same problem if they live in an area in which two or more municipalities are close together; for example in the Mobile, Pritchard, or Chickasaw police jurisdictions.

13A. Members of the class of Plaintiffs, including Clyde Jones have been required to purchase business licenses to engage in business within the police jurisdiction.

13B. Members of the class of Plaintiffs, including Clyde Jones and Donald E. Lankford have been required to purchase building permits from the City of Tuscaloosa and submit to inspections of buildings within the police jurisdiction.

13C. Members of the class of Plaintiffs, including Clyde Jones, Roy W. Johnson, Donald E. Lankford, and Herbert Flora, have been required to pay a Tuscaloosa city tax on cigarettes bought within the police jurisdiction.

13D. Members of the class of Plaintiffs, including

Roy W. Johnson, have been required to pay a Tuscaloosa city tax on packaged beer bought within the police jurisdiction.

13E. Members of the class of Plaintiffs, including Roy W. Johnson, have been required to pay a higher price on wine or liquor bought for on-premises consumption because of a tax imposed by the City of Tuscaloosa on retailers of wine and liquor in the police jurisdiction.

14. (Deleted)

15. (Deleted)

16. Alabama law requires a taxpayer to receive a rebate of taxes illegally collected only if the taxes were paid under protest. This court has no jurisdiction to enjoin the collection of state or local taxes, but the decision of this suit will affect the legality of such taxes. Therefore, the Plaintiffs request that all taxes, fees, or licenses paid to a municipality by persons in the police jurisdiction be considered to have been paid under protest. Such an order would have no adverse effect upon the Defendants but would preserve the rights of Plaintiffs' class to claim rebates of taxes if they obtain a favorable decision from this court.

RELIEF

WHEREFORE, THE PREMISES CONSIDERED, the Plaintiffs pray this Court to grant the following relief:

A. Certify both the Plantiffs and Defendants as proper representatives of their respective classes.

B. Convene a three-judge district court to hear this action.

C. Declare Alabama Code, Tit. 37, S9, to be unconstitutional and enjoin its enforcement or implementation.

D. Declare Alabama Code, Tit. 37, SS585 and 733 to be unconstitutional insofar as they allow the exercise of any municipal power outside the limits of a municipality and enjoin their enforcement o implementation to that extent.

E. Grant a prelimi ary injunction requiring each member of the Defendant class to consider and hold that all taxes, licenses, and fees collected from persons residing within their respective police jurisdiction on account of activities or conduct in the police jurisdiction were paid under protest of the persons as to the constitutionality of collecting such tax, license, or fee; provided however, that no notice of such

consideration of protest shall be required from any party and further provided that this injunction shall not affect the applicable statute of limitations.

F. (Deleted)

G. Grant the Plaintiffs their costs, including a reasonable attorney's fee.

H. Grant such other, further, and different relief as the premises may demand.

Submitted by,

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ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

(Convened Pursuant to 28 U.S.C. Sec. 2281)

HOLT CIVIC CLUB, an unincorporated association, et al.,	)	
PLANITIFF,	)	
VS.	)	C. A. 73-M-736
CITY OF TUSCALOOSA, a Municipal Corporation, et al.,	)	
DEFENDANTS.	)	

MOTION TO DISMISS

Comes now the Defendants and move the Court to dismiss the complaint in this cause on the following grounds:

1. That Title 28 U.S.C. Section 1341 prohibits the Court from asserting jurisdiction of statutes or ordinances providing for the purchase of business licenses, building permits or other types of fees or assessments prescribed pursuant to ordinance.

2. That the complaint alleges neither facts showing a case or controversy nor facts showing a justiciable controversy for declaratory relief other than facts setting up

controversies in regard to statutes providing for the levying of taxes or fees which come within the influence of the Tax Injunction Act of 1937, (Title 28 U.S.C. Section 1341).

3. The complaint fails to state a claim upon which relief can be granted since the allegations of the complaint raise no substantial federal or constitutional question.

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IN THE SUPREME COURT
OF THE UNITED STATES

No. 77-515

HOLT CIVIC CLUB, etc., et al.,

Appellants,

vs.

CITY OF TUSCALOOSA, etc., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE APPELLANTS

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TABLE OF AUTHORITIES

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Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

Only the opinion of the court of appeals of December 31, 1975, is reported, appearing at 525 F.2d 653. This opinion and the other opinions are included in the Jurisdictional Statement (JS) appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1253. The orders appealed from were entered by a court of three judges convened pursuant to 28 U.S.C. §§2281 and 2284. The

order dismissing the complaint on the merits and denial of injunctive relief was entered on June 7, 1977, and reconsideration thereof was denied July 14, 1977. Timely notice of appeal from both orders was filed August 5, 1977. 28 U.S.C. §2101(b).

STATUTES INVOLVED

The three statutes attacked in this case have been recodified as follows:

Former Citation	Present Citation
Ala. Code, Tit. 37, §9 (1958 Recomp.)	Ala. Code, §11-40-10 (1975)
Ala. Code, Tit. 37, §733 (1958 Recomp.)	Ala. Code, §11-51-91 (1975)
Ala. Code, Tit. 37, §585 (1958 Recomp.)	Ala. Code, §12-14-1 (1975)

The first two statutes are identical, save a few stylistic changes, in the recodification to their respective former codifications. As regards the third, on December 27, 1977, the recorder's courts were abolished and replaced by municipal courts having the same jurisdiction: therefore the former and the present statutes are not identical but have the same effect.

Each of the statutes currently in effect is reproduced in Addendum B to this brief. The former statutes are reproduced at JS 6a-9a.

QUESTIONS PRESENTED

1. May a state provide that residents of a geographical area shall be governed by an adjacent municipality, while prohibiting such residents from voting in municipal elections or otherwise participating in municipal government over themselves?

2. May a three-judge court dismiss a claim of denial of equal protection by residents of such an area, who are also under the authority of a county government, because the relief they seek is not the right to vote in the municipality but rather the removal of the municipal authority over them?

STATEMENT OF THE CASE

Facts

The plaintiffs-appellants are an unincorporated civic association and seven residents of the unincorporated community of Holt, located on the northeastern fringe of the City of Tuscaloosa, Alabama. Holt is an urbanized, poor area of mixed racial composition.

Because Holt is situated within 3 miles of the City of Tuscaloosa, its residents are subject to the "police and sanitary regulations" of the City of Tuscaloosa, Ala. Code, §11-40-10 (1975), to the jurisdiction of the municipal court, Ala. Code, §12-14-1 (1975), and to the licensing authority of the city, Ala. Code, §11-51-91 (1975). (A6)[1] Real and personal property located outside the city is not subject to the city's property tax nor to its zoning power.[2]

This "police jurisdiction"[3] contains about 16,000 residents while the city itself

1. Addendum A to this brief contains a list of the ordinances of the City of Tuscaloosa that are applicable in the "police jurisdiction."

2. Ala. Code, §11-40-10 (1975), has been held not to grant the power to zone extraterritorially, but such power could be granted by the legislature. Roberson v. City of Montgomery, 285 Ala. 421, 233 So.2d 69 (1970).

3. The term "police jurisdiction" will be used in this brief to refer to the extraterritorial zone in which the City may exercise its powers — that is, the three mile wide belt extending outward from the city limits.

has 65,733 residents. (A 17-19) These police jurisdiction residents are not allowed to vote in Tuscaloosa's municipal elections nor may they initiate a recall petition. (A 6)

The City of Tuscaloosa was unable to determine how many arrests it makes within the police jurisdiction, but was able to provide some general statistics about the time spent by each police patrol car in the police jurisdiction, Answers to Third Interrogatories, pp. 2-3. It is roughly 17% of all seven patrol's time.

The city also collects various types of licenses and taxes in its jurisdiction. The percentage of these license fees or taxes collected in the police jurisdiction were as follows (A 33-35 and 41):

	1973	1975
business licenses	2.4%	2.5%
cigarette tax	1.1%	15.1%
lodging tax	19.6%	11.4%
beer tax	14.7%	8.5%
building inspection fees	25.0%	10.6%
number of building permits	11.9%	15.0%

Proceedings

This action was originally dismissed by a single judge court, said dismissal being reversed by the court of appeals. The case was remanded for the convening of a three-judge court. Discovery proceeded both before

and after the original dismissal. The three-judge court granted the motion to dismiss, no trial being held.

Both the equal protection and due process claims were dismissed. The court granted leave to amend to allege specific ordinances which plaintiffs claimed denied them due process, and dissolved the three-judge court remanding the case to the single judge for further proceedings, Plaintiffs sought reconsideration of that ruling (A 42), which was denied. This appeal followed.

Summary of Argument

This case is brought by residents of the "police jurisdiction" of the City of Tuscaloosa who complain that they have been denied equal protection and due process of the laws because they are denied the franchise in the city government. City residents who stand in practically the same relationship to the city are allowed to vote. The remedy sought by appellants is the removal of governmental authority over them -- at least by any government in which they cannot vote.

The court below and this Court have jurisdiction to hear this case. The Tax Injunction Act, 28 U.S.C. §1341, does not bar jurisdiction because any effect on taxes is ancillary to the challenge to governmental authority. To rule on the applicability of 28 U.S.C. §1341, this Court would have to pass on issues not decided below: whether the Act covers declaratory relief, whether it covers license fees, and whether Alabama provides "a plain, speedy and efficient remedy."

Appellants assert causes of action under 42 U.S.C. §1983 against individual officials. Although the city itself might not be a proper party, this question need not be reached because of the presence of clearly appropriate defendants.

Appellants have standing to challenge the governmental authority over them. They are affected by it in their daily lives. They do not have to claim, therefore, specific threats of prosecution, but nonetheless they do allege specific acts of enforcement of ordinances.

The three-judge court dismissed appellants' claims on the merits. This was a denial of injunctive relief and jurisdiction to hear the appeal is properly vested by 28 U.S.C. §1253.

The city has not shown, and the court below did not find, that the police jurisdiction residents have substantially less interest in the city government than the residents of the city proper. Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969). The city's power and responsibility in the police jurisdiction is extensive and analogous to the powers of organized counties over unorganized counties in South Dakota, Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975), or the powers that the State of Maryland had over residents of the National Institutes of Health enclave, Evans v. Cornman, 398 U.S. 419 (1970).

There are alternative methods of providing some governmental services to, and restrictions upon, the urban fringe, without disenfranchising the residents of the area.

These include active governance by county officials or the creation of special-purpose districts to provide some services. Neither of these methods would place urban fringe residents under the control of a government for which others could vote, but they could not. If such alternative methods which meet the governmental interest but avoid the discriminatory aspects are available, then the Court should enjoin the discriminatory method. Buckley v. Valeo, 424 U.S. 1 (1976).

The district court dismissed this suit on the grounds that the plaintiffs had asked for the wrong relief -- although the court apparently acknowledged that the plaintiffs stated a cause of action. A court should not dismiss a suit on the basis of the relief requested, but should consider whether the plaintiff is entitled to any relief. New Amsterdam Casualty Co. v. Waller, 323 F.2d 20 (4th Cir. 1963), cert. denied 376 U.S. 963 (1964).

ARGUMENT

I

THE QUESTION OF JURISDICTION.

In its order of March 6, 1978, this Court postponed further consideration of the question of jurisdiction until the hearing of the case on the merits. Appellants will herein discuss those issues which might conceivably be of concern to this Court.

The complaint alleged causes of action under the equal protection and due process clauses of the fourteenth amendment and 42 U.S.C. §1983. Jurisdiction was alleged to be vested by virtue of 28 U.S.C. §§1331, 1343, 2201 and 2281. The relief prayed for was that Ala. Code, Tit. 37, §9 (1958 Recomp.) be declared unconstitutional and its enforcement enjoined; that Ala. Code, Tit. 37, §§585 and 733 (1958 Recomp.) be declared unconstitutional and their enforcement enjoined insofar as they affect the police jurisdiction; that a preliminary injunction be granted requiring each member of the defendant class to treat questioned taxes and fees as if paid under protest; and such other, further and different relief as may be justified.

The Tax Injunction Act

Defendants have asserted both in the district court and here that the district court lacked jurisdiction by virtue of the Tax Injunction Act, 28 U.S.C. §1341. That statute reads:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

This matter has not been addressed by any of the courts below, save the initial dismissal by the single judge court. Prior to dismissing the whole complaint, that first opinion also stated:

> A portion of the relief sought, however, i.e., a determination that the paying of taxes be judicially determined to have been under protest cannot be granted and that portion of the complaint may be dismissed by a single judge. Maryland Citizens for a Representative Assembly v. Governor of Maryland, 429 F.2d 606 (4th Cir. 1970).

JS 34a. This was apparently based on 28 U.S.C. §1341. The court of appeals made no mention of this ground when it reversed, and neither did the three-judge court on remand. Appellants suggest that this Court

need not reach any issue presented under §1341 on this record for several reasons.

First, appellants have not, in the traditional sense, sought to enjoin the collection of a state tax. They challenge governmental authority. The power to tax is but one incident of governmental authority, albeit a highly visible one. Appellants raise substantial constitutional issues about governmental structure and authority and could hardly do so without it having an effect on the authority of that government to tax. But that effect was not the purpose of the litigation, and to interpret §1341 as forbidding all suits which may have an ancillary effect would be inconsistent with precedent.

For example, in Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), this Court reversed the dismissal of a complaint by the district court and held a state poll tax statute unconstitutional. That decision certainly had an effect on the state poll tax, but §1341 was not held to bar jurisdiction.[1] It was not mentioned in that opinion, nor in Hill v. Stone, 421 U.S. 289 (1975). Appellants are primarily challenging the validity of Ala. Code,

1. See also, United States v. State of Alabama, 252 F.Supp. 95 (M.D. Ala. 1966)(three-judge court), where the poll tax was specifically enjoined, not merely held unconstitutional.

11-40-10 (1975), which authorizes the enforcement of police and sanitary regulations in the police jurisdiction. Section 1341 is not relevant to this empowering provision, even if it could be properly applied to taxing and licensing ordinances enforced thereunder. Therefore, the Court can properly reach the challenge to the police and sanitary regulations.

Second, if the Court were to reach the question of the applicability of §1341 to the whole complaint, several issues would be presented. One is whether this statute encompasses actions for declaratory judgment. Although appellants have asked for an injunction against the statute's extension of governmental powers, they have not asked for an injunction against the collection of any state tax. This Court has not expressly decided whether, if §1341 in a given case forbids the issuance of inuunctive relief, it also prohibits issuance of declaratory relief. See, Great Lakes Dredge and Dock Co. v. Huffman, 319 U.S. 293, 299 (1943). Jurisdiction might exist for a district court to declare the collection of a state tax unconstitutional even if injunctive relief could not be granted. Compare, Steffel v. Thompson, 415 U.S. 452 (1974), with Samuels v. Mackell, 401 U.S. 66 (1971).

Third, there would be presented the issue, required by the statute, of determining whether there exists "a plain, speedy and efficient remedy" in the courts of Alabama. This record would not be a good basis for determining that issue. Such determination should be made in the first instance by the district court.[1]

And finally, there would be presented the question of whether license fees, which is one of the matters involved, are "taxes" within the meaning of §1341. The license fees in the police jurisdiction are not treated as general taxes because the fees are limited not only to one-half of the amounts within the city proper, but are also limited in purpose to cover the cost of providing services. White v. City of Decatur, 225 Ala. 646, 144 So. 873 (1932). Thus they

1. Appellants suggest, however, that there is no effective remedy. In Weissinger v. Boswell, 330 F.Supp. 615 (M.D. Ala. 1971)(three-judge court), a suit challenging the ad valorem tax assessments in Alabama, the court said:

> It should be noted that defendant's contention, as a ground for dismissal, to the effect that plaintiffs' action is barred by the Tax Injunction Act of 1937, 28 U.S.C. §1341, was considered and disposed of by this Court in the October 29, 1969, order. This portion of our order was to the effect that the Alabama courts do not afford plaintiffs a plain, speedy and efficient remedy....

330 F.Supp. at 618, n.4.

are unlike taxes in that they are actually fees for services, as opposed to general revenue taxes.

Statutory Jurisdiction

The defendants in this case are the City of Tuscaloosa, the three city commissioners, and the city recorder. There can be no question that proper jurisdiction is had over the individual defendants by virtue of 42 U.S.C. §1983. Although an argument could be made that the city itself is not a proper defendant, this case does not present that issue directly. Although the city may not be subject to suit under §1983,[1] to decide that the city is not a proper party at all would require decision of important issues. This is not necessary where there is jurisdiction over other defendants in the case.[2]

Although the complaint alleged federal question jurisdiction, 28 U.S.C. §1331, no dollar amount in controversy was alleged.[3]

1. Monroe v. Pape, 365 U.S. 167 (1961); City of Kenosha v. Bruno, 412 U.S. 507 (1973).

2. In Kenosha, the Court recognized that the district court might have proper jurisdiction, and directed inquiry on remand of that issue, based on the intervention of the state attorney general. 412 U.S. at 513-55.

3. This defect in the complaint has never been put in issue. No answers to the complaint have ever been required, the courts twice granting motions to dismiss.

With this lacking, it may be that the only way in which the city is a proper party defendant would be if a cause of action inferred directly under the fourteenth amendment and 28 U.S.C. §1343 would be allowed. As in Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977), that issue need not and should not be decided here because the issues presented may be decided under other proper authority because other defendants are present. If the jurisdictional issue could be reached it should be decided by the district ciurt on remand if such proceedings become necessary. Unlike Mt. Healthy, where at least in this Court the school board was the only defendant, the presence of other defendants here avoids the need for deciding such an important issue.[1]

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1. This Court's opinion in Mt. Healthy does not reflect the presence of any defendant except the school board. The opinions of the district court and the court of appeals are unreported. Appellants have examined the appendix in Mt. Healthy and it appears that individual school board members were dismissed as defendants by the district court and relief was granted only against the school board. Only the board appealed and there was no cross appeal. Thus when the case reached this Court, there was no other defendant and the Court was faced with the need of deciding proper jurisdiction vis-a-vis the school board. Appellants urge that the presence of other defendants here allows the Court to avoid the decision of important jurisdictional questions, as did other factors in Mt. Healthy. Jurisdiction can be properly laid on well settled law to decide the issues presented here.

Standing

The citizen plaintiffs challenge the overall authority of a government to govern them. They do not simply claim that one particular ordinance or law is applied to them in an unconstitutional manner. In such a case an actual threat of application of that ordinance would have to be made. Compare, Boyle v. Landry, 401 U.S. 77 (1971). Furthermore, plaintiffs have alleged enforcement of particular ordinances against them, licensing, taxing and inspection ordinances. (A8) They thus present a case or controversy as residents of the community challenging the governance of the area in which they live. Appellees have conceded as much.[1]

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1. In their brief to the court of appeals the appellees stated:

> Granting, however, that these Plaintiffs are the only persons who could question the authority of a state to delegate any vestage [sic] of police power over them to adjacent municipalities, and admitting standing for this purpose, then the complaint should be so considered.

Brief of Appellees, No. 75-3323, pp. 8-9.

Although appellants do not concede that their right to raise the issue is contingent upon their being the only ones who can raise it, this is a correct view of the situation. A resident of, for example, another state could not challenge a police jurisdiction traffic violation based on the claim of unconstitutional government because he would not have a grievance. He is not treated differently from any other sojourner. It is the residents,

(Footnote continued to next page.)

Three-Judge Court Act

Appellants properly invoked the three-judge court act, 28 U.S.C. §2284 by challenging the constitutionality of a state statute having statewide application and seeking an injunction thereof.[1] The basic police jurisdiction statute provides that if any city or town enforces police or sanitary regulations, said laws "shall have force and effect in the limits of the city or town and in the police jurisdiction thereof, ..." JS 6a. There may be some city or town in Alabama which has no such ordinances, but if they have any they apply to the police jurisdiction. The statute, unquestionably, has statewide effect. Compare, Board of Regents of the University of Texas System v. New Left Education Project, 404 U.S. 541 (1972).

The equal protection claim was dismissed on the merits by the three judge court in the words, "Equal protection has not been extended to cover such contention." JS 2a. The due process claim, that "extraterritorial regulation

(Footnote continued from preceding page.)

and only the residents, who can claim that in their daily lives they are governed by an unconstitutional form of government because residence is the touchstone of the right to have a say so in one's government.

1. This action was filed prior to the enactment of Act of Aug. 12, 1976, Pub.L. 94-381, 90 Stat. 1119, which provides that §2281 shall continue in effect for those actions commenced on or before the date of enactment.

by a municipal government is per se a violation of due process," JS 2a, was dismissed. Leave to amend was granted to specify particular ordinances which plaintiffs might claim deprived them of liberty or property, but the claim of a per se denial of due process had been squarely rejected.[1]

The dissolution of the three-judge court and the dismissal of the claims under equal protection and due process were not made on the basis that the complaint was "wholly insubstantial" or the like, Goosby v. Osser, 409 U.S. 512 (1973); nor was it a dismissal on any procedural grounds. Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974). The dismissal was a "resolution of the merits of the constitutional claim presented below," MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975). The dismissal operated as a denial of the injunctive relief sought and therefore jurisdiction of this Court to hear the appeal properly lies under 28 U.S.C. §1253.

1. That the leave to amend was not a license to relitigate the per se claim is made clear by the dissolution of the three-judge court and the remanding of the case to the single judge for further proceedings. JS 3a.

II

THE STATE OF ALABAMA HAS NOT SHOWN A COMPELLING STATE INTEREST TO SUSTAIN THE DISTINCTION IT HAS MADE BETWEEN RESIDENTS OF TUSCALOOSA'S "CITY LIMITS" AND RESIDENTS OF TUSCALOOSA'S "POLICE JURISDICTION".

A. Tuscaloosa Exercises General Governmental Authority In Its Police Jurisdiction.

The principal question to be decided by this Court is whether the difference in the authority exercised by a city in its police jurisdiction in comparison with that exercised within its corporate limits is supported by a compelling state interest justifying the governance of these police jurisdiction residents while denying them the franchise. The case is therefore analogous to Evans v. Cornman, 398 U.S. 419 (1970) and Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975), in questioning whether the state may use different definitions of territorial jurisdiction for voting and other government functions.

Whether the plaintiffs are attacking a non-geographic definition of voter qualifications, as in Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969), and Cipriano v. City of Houma, 395 U.S. 701 (1969),

or a geographic one, as in Evans or Little Thunder, the test is one of "strict scrutiny" involving

> Whether classifications allegedly limiting the franchise to those resident citizens "primarily interested" deny those excluded equal protection of the laws depends, inter alia, on whether all those excluded are in fact substantially less interested or affected than those the state includes.

Kramer, supra, 395 U.S. at 632. Even though Kramer spoke of "resident citizens," substantially the same test was applied to the question of residency in Evans v. Cornman, supra, 398 U.S. at 422-23.

The legislation establishing the police jurisdiction, in effect, establishes two geographical areas for a city. The first is the city proper: an area where the city may exercise its full authority and whose residents are electors of the city government. The second is called the "police jurisdiction": an area where the city may exercise limited but substantial authority and whose residents are not electors of the city government.

A city may enforce its "police and sanitary regulations" in the police jurisdiction, Ala. Code, §11-40-10 (1975). These regulations encompass nearly all of the regulatory powers[1] of the city except zoning powers.

1. Attached hereto as Addendum A is a list of the ordinances of the City of Tuscaloosa actually applicable in the police jurisdiction.

Roberson v. City of Montgomery, 285 Ala. 421, 233 S.2d 69 (1970). Although the municipality cannot tax real and personal property in the police jurisdiction, it may collect license fees up to one-half of the in-city rate. Ala. Code, §11-51-91 (1975).[1]

In defense of its police jurisdiction, the city has raised only the issues of protection of the city from a deleterious affect on the "quality of life" in the city and protection of the police jurisdiction residents "against the encroachment of incompatible and noxious land uses adjacent to and near their homes."(A 19-21) Neither of these explains why the residents of the police jurisdiction are not "primarily interested" in the city government so that they should be allowed to vote.

The difference between the city's power in the police jurisdiction and the city's power within the city itself is fairly small. The extent of Tuscaloosa's power over the

1. The city is supposed to tailor its license fees in the police jurisdiction to the services performed and may not use the licenses as a revenue producer. White v. City of Decatur, 225 Ala. 646, 144 So. 873 (1932); Alabama Power Co. v. City of Carbon Hill, 234 Ala. 489, 175 So. 289 (1937). Because the licensee must demonstrate the invalidity of the license amount, City of Andalusia v. Fletcher, 240 Ala. 110, 198 So. 64 (1940), there is little incentive to the city to charge less. The City of Tuscaloosa charges the full amount permissible by statute.

police jurisdiction is analogous to that of an organized county over an unorganized county in South Dakota.

> [E]ach of the unorganized counties and the organized counties to which it is attached form a single unit of local government "for the administration of governmental and fiscal affairs, including all state, county, judicial, taxation, election, recording, canvassing, and foreclosure purposes, except in cases where the administration of said affairs is expressly otherwise provided by law. SDCL §7-17-1 (1967)."

Little Thunder v. State of South Dakota, 518 F.2d 1253, 1256 (8th Cir. 1975). The only function that the unorganized county could carry out independent of the organized county to which it was attached was its own highway building and maintenance program. 518 F.2d at 1255; SDCL §13-12-5.

In other cases decided by this Court, governmental units with less powers than Tuscaloosa exercises in the police jurisdiction have been held to be subject to the equal protection clause in their electoral apportionment. For instance, the residents of the National Institutes of Health enclave in Maryland, were subject to Maryland's criminal, tax, unemployment and workman's compensation,

and driver's license laws, its civil court jurisdiction, but not to real and personal property taxes, state criminal courts (state criminal laws were prosecuted in federal court), or to compulsory education laws. Evans v. Cornman, 398 U.S. at 424-5. While the NIH enclave residents were subject to Maryland's criminal laws but not its criminal courts, the people of Holt are subject to Tuscaloosa's police and sanitary ordinances and Tuscaloosa's municipal court jurisdiction.

B. There Are Alternative, Non-Discriminatory Methods of Fulfilling The State Purpose.

When state action is subjected to the "strict scrutiny" test, the Court should examine alternative strategies that could achieve the same purpose. If there are such alternatives which fulfill a legitimate state purpose without unconstitutional side effects, then the discriminatory method cannot be defended on the grounds of necessity. See, e.g., Buckley v. Valeo, 424 U.S. 1, 14-23 (1976); Dunn v. Blumstein, 405 U.S. 330 (1972).

The State purpose here might be to benefit police jurisdiction residents by giving them some, but not all, municipal services or it could be to protect the city from

undesirable conditions in the police jurisdiction.[1] The City of Tuscaloosa has actually argued that both justify its exercise of police power in the extraterritorial zone. (A 19-21 and Motion to Affirm, 4-6)[2] There exist other methods of fulfilling either state purpose without subjecting residents of the police jurisdiction to goverance by an entity from which they are disenfranchised. A recent law review article lists five proposed solutions:

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1. The State has apparently decided that only areas not under municipal control could be such a threat to an adjacent municipality. The police jurisdiction of one city does not extend into the territorial li ts of another city, even though such a city could be a threat to health and order by failing to have any police, housing or health ordinances. The City of Tuscaloosa has, in fact, argued that it should exercise police powers in areas that may potentially be part of the City, not in other cities. This assumes that any city will provide proper regulation of life but that suburban development and county government will not.

2. These are the usual justifications given by commentators. See, Comment, "The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities," 45 Chicago L.Rev. 151, 151-2 (1977); F. Sengstock, Extraterritorial Powers in the Metropolitan Area, 3, 45 (1962); R.T. Daland, Municipal Fringe Area Problem in Alabama 3 (1953); J.C. Bollens, "Controls and Services in Unincorporated Urban Fringes," in ICMA, Municipal Year Book 53-54 (1954).

a) reversion of control to the state legislature (to pass legislation) and state police (to enforce);

b) active management by State officials;

c) active management by county officials;

d) management by special purpose government;

e) management at the local level (e.g., townships).

Comment, "The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities," 45 Chicago L.Rev. 151, 171-78 (1977).

The first three of these could be used in Alabama under the existing constitutional framework. Management by county officials could easily be the most practical.[1] In Alabama -- as in most Southern states -- the county is

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1. Counties have a sheriff to provide police protection, courts to enforce laws, and the ability to provide a myriad of other municipal-type services, among which are the following (all citations are to the 1975 Ala. Code): levy taxes, support the poor, lay sewers, and construct sewage treatment plants (§11-3-11); maintain streets (§11-83-1); participate in a forest fire protection program (§9-13-181); mark boundaries of burial places (§11-17-1); establish parks and museums (§11-18-1); establish recreation boards (§11-86-1); establish water conservation and irrigation corporations (§§9-10-30 and 11-21-1 et seq); finance waterworks (§§11-9-20 et seq); establish land use controls in flood-prone areas (§11-19-1); adopt a building code (§41-9-166); construct or acquire airports (§4-1-1); contract with a city for the city to provide fire protection (§11-43-142); own an electrical system (§11-81-200); create a housing authority (§24-1-60); zone around an airport (§4-6-2); establish sanitary
(Footnote continued to next page.)

a powerful an politically important unit of government. And any of the other four could be utilized, and are constitutionally preferable to the current method.[1]

C. Government Without Franchise As Here Denies Appellants Due Process of the Law.

Appellants present an unusual question. Government without representation is such an anathema in our federal system that it is rarely necessary to challenge governmental extensions of authority without corresponding extensions of the franchise. And while Evans v. Cornman, 398 U.S. 419 (1970), presented a somewhat analogous factual situation, different relief has been sought here. Appellants rely

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(Footnote continued from preceding page.)

conditions for livestock (§2-4-4); and establish and maintain libraries (§11-90-1 et seq).

1. In addition to government by the county, many areas of Alabama have realized the necessity of providing more services than the county could perform (or needed to perform on a county-wide basis) and have adopted special, limited purpose, local governments. These are increasing in use in Alabama. See the following amendments to Ala. Const. (1901): 227 (irrigation districts); 230 (hospital district, Baldwin County); 239 (fire protection or garbage disposal districts, Jefferson County); 243 (Elk River watershed authority); 247 (Bear Creek watershed authority); 257 (water management districts); 343 (public service districts in Shelby County for fire, water, sewage, medical, police, and other services); and 358 (fire protection or garbage disposal districts, Tuscaloosa County).

primarily on equal protection where the franchise has been granted, but limited in an unconstitutional way. Limiting the electorate has often been held to violate the equal protection clause. Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

But appellants also urge that the structure of government imposed on them, government by an adjacent geographical entity in which they have no voice, is also a denial of due process of law. They have liberty and property interests which are regulated not by themselves but by others. The issue appellants raise is so fundamental an issue that it has not been litigated, or not reached, in decisions based on the equal protection clause. But Judge Johnson, concurring in United States v. Alabama, 252 F.Supp. 95, 105-08 (M.D. Ala. 1966)(three-judge court), reasoned that the poll tax was a violation of the due process clause of the fourteenth amendment. The right to vote was considered protected by the due process clause by the court in United States v. Texas, 252 F.2d 234, 250 (W.D. Tex. 1966)(three-judge court) aff'd., 384 U.S. 155 (1966).

Appellants urge that governance without the franchise is a fundamental violation of the due process clause.

III.

THE DISTRICT COURT ERRED IN HOLDING THAT APPELLANTS' COMPLAINT MUST BE DISMISSED BECAUSE THEY SOUGHT THE WRONG REMEDY.

The district court held as follows in dismissing the appellants' equal protection claim:

> Plaintiffs do not seek extension of the franchise to themselves, see Little Thunder v. South Dakota, 518 F.2d 1253 (CA8, 1975), but rather a declaration that extraterritorial regulation is unconstitutional per se. Equal protection has not been extended to cover such contention. The motion to dismiss is GRANTED with respect to the equal protection claim.

JS 2a.

If the court was ruling that plaintiffs could obtain relief if they sought the franchise but not if they seek freedom from regulation, then the court erred in dismissing the complaint. It is not the relief demanded, but the relief to which the plaintiff is entitled, that he will receive. Wright & Miller, Federal Practice and Procedure: Civil §1255, p. 252; §2664.

> [The plaintiff] need not set forth any theory or demand any particular relief for the court will award appropriate relief if the plaintiff is entitled to it upon any theory.

New Amsterdam Casualty Co. v. Waller, 323 F.2d 20, 24-5(4th Cir. 1963), cert. denied 376 U.S. 963 (1964). Hostrop v. Board of Junior College District No. 515, 523 F.2d 569 (7th Cir. 1975), cert. denied 425 U.S. 963 (1976). Courts clearly are not limited to the prayer for relief in view of the federal rules of civil procedure. Rule 8(a) and 54(c), F.R.Civ.P.

Of course, to cover such a situation plaintiffs prayed for "such other, further, and different relief as the premises may demand." (A 10) Such a general prayer is really not necessary in view of the civil rules of procedure.

An extension of the franchise to the residents of the police jurisdiction might have had some undesired results. For instance, some police jurisdiction residents might not want to be included in the city; conversely some cities might not like to have a substantial number of new residents thrust upon them. An order denying municipal authority over the residents of the police jurisdiction unless the State subsequently chooses to confer the franchise on these residents is a less intrusive remedy than would be an order directly compelling the franchise. As such, it was not only appropriate relief, but suggested by principles of comity. Rather than extend the franchise, the state legislature and various county commissions could choose a method of providing

some additional government (if they felt any was needed) for the urban fringe. See Section I-B, supra, at 26-7.

IV.

THE RELIEF REQUESTED WOULD NOT DISRUPT INNOVATIVE STATE GOVERNMENTAL EXPERIMENTS BECAUSE THE AUTHORITY CHALLENGED IS VIRTUALLY UNIQUE AND NOT RECENT IN ORIGIN.

The first session of the Alabama Legislature incorporated ten towns and one city and in each case, established specific boundaries or made reference to the boundaries established by others. Ala. Acts, pp. 106-125 (1819).[1] From this time until 1907, the powers of city officials were specifically limited to the corporate limits, Ala. Code, §2950-52 (1896), except for the "city courts." While §2951 provided that the "intendant [mayor] has the powers and jurisdiction of a justice of the peace in all matters, civil and criminal, arising within the corporate limits,"

1. Although a city must now have definite boundaries, this was apparently not the case in England before the Municipal Corporations Act of 1835:

> A municipal corporation, like the manor and unlike the parish and the county, was, in fact, not primarily a territorial expression. It was a bundle of jurisdictions relating to persons, and only incidentally to the place in which those persons happened to be.

S. and B. Webb, English Local Government; The Manor and the Borough, Part One, 289 (1908). See also, F. Sengstock, Extraterritorial Powers in the Metropolitan Area, 1-2 (1962).

§944 (1896) provided that "the city courts and the judges thereof have and exercise all the jurisdiction and powers of the circuit court and the judges thereof." Since there is no other reference in that code to city courts, this section must be applicable to city courts created in specific charters of large cities. See, e.g., Act 78, 1871 Regular Session (Mobile city court); Act 301, 1900 Regular Session (Montgomery city court); Act 558, 1888 Regular Session (Birmingham city court). These city courts thus had the power to enforce state laws against non-residents of the city, but the city did not have the right to impose its ordinances outside its own jurisdiction.

The "police jurisdiction" of Alabama cities was created by Act 797, 1907 Regular Session, which was a comprehensive act "provid[ing] for the organization, incorporation, government and regulation of cities and towns" passed pursuant to the newly-added requirement of the 1901 Constitution that the legislature "shall not pass a special, private, or local law ... incorporating a city, town, or village, ... amending, confirming, or extending the charter of any private or municipal corporation ...." Ala. Const., Art IV, §104 (1901). Sections 57 and 58 of Act 797 have now been

recodified as Ala. Code, §11-40-10 (1975) -- the primary police jurisdiction statute. Section 60 of the Act allowed the recorder's court in each municipality to enforce city ordinances within the city and the police jurisdiction. This section was last codified as Ala. Code, Tit. 37, §585 (1958 Recomp.), and has now been replaced by Ala. Code, §12-14-1 (1975)(creating a municipal court with the same extra-territorial authority).

In 1927, the legislature first allowed cities to collect license fees (up to one-half the in-city fee) in the police jurisdiction. Act 580, 1927 Regular Session. This Act, with some modifications, is now found codified in Ala. Code, §11-51-91 (1975).

These acts can be classified according to the four types of extraterritorial powers indentified by one commentator:

> (1) the police power, (2) the power of taxation, (3) the power of eminent domain, and (4) the power to do business as a corporation and to acquire and use property for municipal purposes by methods other than direct taxation or eminent domain.

Anderson, "The Extraterritorial Powers of Cities," 10 Minn.L.Rev. 475, 482 (1926). It is only the first of these -- the police power -- that is being attacked in this action. If the police power falls, so too will the second

(the power of taxation), under the Alabama decisions (see, note at 22, supra).

The third and fourth types of extra-territorial powers -- the power of eminent domain and the power to do business -- are really corporate rather than governmental powers[1] and thus need not be limited by the city boundaries. All domestic corporations have the power to do business anywhere in the State and there is no reason to limit municipal corporations. Similarly, the right of eminent domain has been granted to electric, gas, railroad, telephone, and telegraph companies, Ala. Code, §§10-5-1 et seq (1975), as well as private landowners needing a right of way to a public road, Ala. Code, §18-3-1 (1975).

As pointed out earlier, Alabama cities do not enjoy the right of extramural zoning as part of their "police power," but they do have the right to control the subdivision of land within five miles of their respective

1. This dichotomy of governmental and corporate powers is defined in Maddox, Extraterritorial Powers of Municipalities in the United States 1-2 (1955):

> [The] ability or capacity for exercising control or authority over an area and persons therein... might be termed the "governmental power". ... [T]he ability of the municipality to do business or provide services in its capacity as a corporation [is its "corporate" power].

borders, Ala. Code, §11-52-30 and §11-52-31 (1975), and to adopt a master plan for the municipality and adjacent areas, Ala. Code, §11-52-8 (1975).[1] Although these statutes were not challenged, a voiding of the extra-territorial police power would also call into question the validity of subdivision controls, but not the planning function of city government.

Finally, there is the type of municipal power over non-residents that Sengstock refers to as "incidental exercise of police power" over businesses located outside the municipality but which sell their products within the city. Sengstock, op. cit. 45-47. For instance, in Dean Milk Co. v. City of Aurora, 404 Ill. 331, 88 NE2d 827 (1949), Aurora was allowed to inspect and license extramural milk processors as a condition to their right to sell within the city. Cf. Dean Milk Co. v. City of Madison, 340 U.S. 349, 354-5 (1951). Such actions by a city are not attacked in this case.

Other States

Three states grant cities the same extensive police powers that Alabama's cities enjoy: Idaho, one mile zone around certain

1. The power to plan is not the power to zone, Roberson v. City of Montgomery, 285 Ala. 421, 233 So.2d 69 (1970).

cities, Idaho Code, §50-606 (1967); North Dakota, one-half mile around all cities, N.D. Cent. Code, §40-06-01(2)(1968); South Dakota, one mile around all cities, S.D. Compiled Laws Ann. §9-29-1 (1967). Other states allow their cities to regulate certain types of activities that could be offensive, dangerous or objectionable, or to regulate health and sanitary conditions, or to zone, or to regulate subdivision platting. In all, 34 states have some type grant of extraterritorial power to cities. See, Comment, "The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities," 45 Chicago L.Rev., 151, 152-57 and ns. 7-39 (1977). Most of the 16 states which do not grant extraterritorial powers to cities are located in the Northeast where there is a tradition of townships (or similar entities) as sub-county governments.

CONCLUSION

The dismissal of the complaint should be reversed and the power to govern without the franchise should be declared a denial of due process and equal protection of the laws.

The case should be remanded to the district court of three judges for consideration and issuance of appropriate relief.

Respectfully submitted,

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Neil Bradley
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ATTORNEYS FOR APPELLANTS

American Civil Liberties
Union Foundation, Inc.

ADDENDUM A

Tuscaloosa ordinances having effect, by their terms, in the police jurisdiction as well as the city. All citations unless otherwise noted are to sections of Code of Tuscaloosa (1962, Supplemented 1975).

Licenses

4-1 ambulance
9-4, 9-18, 9-33 bottle dealers
19-1 junk dealers
20-5 general business license ordinance
20-67 florists
20-102 hotels, motels, etc.
20-163 industry

Buildings

10-1 inspection service enforces codes
10-10 regulation of dams
10-21 Southern Standard Building Code adopted
10-25 building permits
13-3 National Electrical Code adopted
14-23 Fire Prevention Code adopted
14-65 regulation of incinerators
14-81 discharge of cinders
Chapter 21A mobile home parks
25-1 Southern Standard Plumbing Code adopted
33-79 disposal of human wastes
33-114, 118 regulation of wells

Public Health

5-4 certain birds protected
5-40, 42, 55 dogs running at large and bitches in heat prohibited
14-4 no smoking on buses
14-15 no self-service gas stations
15-2 regulate sale of produce from trucks
15-4 food establishments to use public water supply
15-16 food, meat, milk inspectors
15-37 thru 40 regulates boardinghouses
15-52 milk code adopted
17-5 mosquito control

Traffic Regulations

22-2 stop & yield signs may be erected by chief of police
22-3 mufflers required
22-4 brakes required
22-5 inspection of vehicle by police
22-6 operation of vehicle
22-9 hitchhiking in roadway prohibited
22-9.1 permit to solicit funds on roadway
22-11 impounding cars
22-14 load limit on bridges
22-15 police damage stickers required after accident
22-25 driving while intoxicated
22-26 reckless driving
22-27 driving without consent of owner
22-33 stop sign
22-34 yield sign
22-38 driving across median
22-40 yield to emergency vehicle
22-42 cutting across private property
22-54 general speed limit
22-72 thru 78 truck routes

Criminal Ordinances

23-1 adopts all state misdemeanors
23-7.1 no wrecked cars on premises
23-15 nuisances
23-17 obscene literature
23-20 destruction of plants
23-37 swimming in nude
23-38 trespass to boats
26-51 no shooting galleries in the police jurisdiction or outside fire limits (downtown area)
28-31 thru 39 obscene films

Miscellaneous

20-120 thru 122 cigarette tax
24-31 public parks and recreation
26-18 admission tax
Chapter 29 regulates public streets
30-23 taxis must have meters

ADDENDUM B

STATUTES

§11-40-10. Police jurisdiction; territorial operation of ordinances for enforcement of police or sanitary regulations.

The police jurisdiction in cities having 6,000 or more inhabitants shall cover all adjoining territory within three miles of the corporate limits, and in cities having less than 6,000 inhabitants, and in towns, such police jurisdiction shall extend also to the adjoining territory within a mile and a half of the corporate limits of such city or town.

Ordinances of a city or town enforcing police or sanitary regulations and prescribing fines and penalties for violations thereof, shall have force and effect in the limits of the city or town and in the police jurisdiction thereof, and on any property or rights-of-way belonging to the city or town. (Code 1907, §1230; Code 1923, §1954; Code 1940, Tit. 37, §9).

§11-51-91. Establishment and collection of license for conduct of business, trade or profession outside corporate limits of municipality.

Any city or town within the state of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town but outside the corporate limits thereof; provided,

that the amount of such licenses shall not be more than one half the amount charged and collected as a license for like business, trade or profession done within the corporate limits of such city or town, fees and penalties excluded; provided further, that when the place at which any such business, trade or profession is done or carried on is within the police jurisdiction of two or more municipalities which levy the licenses thereon authorized by this section, such licenses shall be paid to and collected by that municipality only whose boundary measured to the nearest point thereof is closest to such business, trade or profession; and provided further, that this section shall not have the effect of repealing or modifying the limitations in this division relating to railroad, express companies, sleeping car companies, telegraph companies, telephone companies and public utilities and insurance companies and their agents. (Acts 1927, No. 580, p. 674; Acts 1932, Ex. Sess., No. 235, p. 240; Code 1940, Tit. 37, §733; Acts 1943, No. 502, p. 477.)

§12-14-1. Establishment; jurisdiction.

(a) There is hereby established, effective December 27, 1977, for each municipal corporation, hereinafter referred to in this article as "municipality," within the state,

except those which elect not to have such courts by ordinance adopted before December 27, 1977, a municipal court subject to the authority, conditions and limitations provided by law.

(b) The municipal court shall have jurisdiction of all prosecutions for the breach of the ordinances of the municipality within its police jurisdiction.

(c) The municipal court shall have concurrent jurisdiction with the district court of all acts constituting violations of state law committed within the police jurisdiction of the municipality which may be prosecuted as breaches of municipal ordinances. (Acts 1975, No. 1205, §8-101.)

IN THE

Supreme Court of the United States

No. 77-515

HOLT CIVIC CLUB, etc., et al.,

Appellants,

vs.

CITY OF TUSCALOOSA, etc., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE APPELLEES

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QUESTIONS PRESENTED

Appellees in this case do not believe that the facts as alleged in the Bill of Complaint give rise to or require an answer to the legal questions proposed by Appellants on page three (3) of their Brief under the heading, "QUESTIONS PRESENTED".

Appellees suggest that the questions of law which arise out of the facts of this case are as follows:

1. The jurisdictional question:

   Was this action "required" to be heard and determined by a three judge district court?

2. As to the merits:

   (a) Is a grant of authority by a state to its municipalities, to exercise extraterritorial regulation, unconstitutional, per se, under either the Due Process or Equal Protection Clause of the Fourteenth Amendment?

   (b) Is the rule of law, established by the "voting rights" cases and the "compelling state interest" test for application of the Fourteenth Amendment developed therein, applicable to grant of authority by a state to a municipality to extend and enforce police and sanitary regulations beyond the city's territorial limits?

STATEMENT OF THE CASE

Plaintiffs-Appellants are Holt Civic Club, an unincorporated association, and eight individual members thereof who reside in an area sometimes referred to as the Holt Community, an unincorporated community outside of the corporate limits of the City of Tuscaloosa,

but within the police jurisdiction thereof. Appellants seek to represent a class of residents who live outside incorporated municipalities, but within the police jurisdiction.[1]

Defendants-Appellees are the City of Tuscaloosa, a municipal corporation, three (3) members of the Commission Board (the governing body of the City), and the Municipal Judge (formerly City Recorder). Defendants are said to be representative of a state-wide class composed of municipalities and municipal officials.

Appellant's primary allegation, in the twice amended complaint is that as residents of the Tuscaloosa Police Jurisdiction, they are governed by Tuscaloosa ordinances, but are not able to vote in municipal elections, resulting in a denial of due process and equal protection of the laws under the Fourteenth Amendment. Appellants also allege that each extension of a municipal corporate limits extends the police jurisdiction, expanding the denial of the right to vote and brings additional persons within the police jurisdiction without their permission and without due process of law.[2]

Broadly, the complaint challenges the authority of the State to authorize its cities to extend and enforce any police or sanitary regulation beyond the city's territorial limits.

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1 Under Alabama Law, the police jurisdiction is defined as that area adjacent to and surrounding the corporate limits, extending 3 miles from cities having population of 6000 or more, and 1 ½ miles from cites having population of less than 6000.

2 Appellants have never insisted on or pursued the extension of jurisdiction allegation.

The complaint asks that the following three statutes be declared unconstitutional, insofar as they permit any regulation to extend beyond the limits of the municipality, and enjoin their enforcement to that extent.[3]

Title 37, Section 9, is the state enabling legislation which permits ordinances of a city or town, enforcing police or sanitary regulations, to have force and effect *in the limits of the city or town and in the police jurisdiction thereof.* (emphasis added)

Title 37, Section 733, is the codification of an Act adopted in 1927 and purports to grant to municipalities the right to charge a limited privilege license outside of the city limits but within the police jurisdiction.[4]

Title 37, Section 585, which has recently been substantially changed by the adoption of the Alabama Judicial Article, simply gives to the municipal court jurisdiction to prosecute for breaches of ordinances of the municipality within its police jurisdiction.

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3 Since the filing of this case, Alabama has adopted a new code of laws and, although references to the sections of Title 37 are not now correct, since all references in the bill of complaint and in the orders of the district court refer to Title 37 sections, we will continue to do so for convenience. There were minor changes in the sections but, insofar as this case is concerned, we believe those changes are not pertinent. The statutes are set out at length in Addendum "B" to the Appellants' Brief.

4 As we will show by subsequent argument, this section added nothing to existing law under interpretation of the Alabama Superme Court, and its only real effect is now to limit any charge for services rendered to an amount equal to not more than one-half of a similar charge which may be exacted within the corporate limits. Appellants point out in their brief that any authority granted under this ordinance would fall, should the court strike down Title 37, Section 9 (above).

The main thrust of the appellants' complaint and argument is that Title 37, Section 9, which permits ordinances of a city or town, enforcing police or sanitary regulations, to have force and effect within the limits of the city or town and in the police jurisdiction thereof, is a violation of appellant's right of due process and equal protection under the Fourteenth Amendment since appellants are not permitted to vote in municipal elections. Appellants contend that the rule of law established in the so-called "voting rights cases" should prevail, and that any extraterritorial jurisdiction granted by a state to its municipal corporations should be subjected to the "strict judicial scrutiny" requirement established and made applicable to the Fourteenth Amendment in the voting rights cases.

Initially, the single judge federal district court dismissed the complaint for failure to state a claim upon which relief could be granted. The court found that a three judge court was not required to be convened under 28 USC, Section 2284 on grounds, among others, that, (1) the state statutes sought to be enjoined were in effect, enabling acts which should be treated, for the purposes of Section 2284, as local acts or ordinances, (2) no state officer was named and that municipal officials were performing acts local in nature and not of statewide application, and (3) the complaint lacked traditional equitable allegations sufficient to confer equitable jurisdiction.[5]

On appeal to the Fifth Circuit, the case was reversed and remanded to the district court for the convening of a three judge court. *Holt Civic Club* v

[5] See Memorandum Opinion of Chief Judge Frank H. McFadden, set out in full at page 18(a) and following, of the Appellants' Jurisdictional Statement.

City of Tuscaloosa, 525 F. 2d 653 (5th Cir. 1975).

Defendant renewed its Motion to Dismiss before the three judge court and the motion was granted. Plaintiffs-Appellants seek direct appeal to the Supreme Court under 28 U.S.C. 1253.

SUMMARY OF ARGUMENT

A. The Jurisdictional Question.

Appellants herein challenge state enabling legislation which permits police or sanitary regulations to extend and be enforced beyond the City's territorial limits and within the police jurisdiction thereof. Appellants do not allege or contend that any particular police regulation or sanitary regulation is applied to them in an unconstitutional manner, or that there is any threat that such regulations will be applied in an unconstitutional manner. (Appellants Brief, pp. 8 and 17).

Although Appellants allege some past incidences involving collection of fees for services rendered, they do not allege any existing live controversy involving them and a specific police or sanitary regulation; nor do they allege any injury, or threat of injury, from such regulations, but rely for jurisdiction on the contention that, being subjected to regulations of a police and sanitary nature, they are, in effect, governed by the City; that they are not allowed to vote in City elections, and that the denial of the right to vote is an infringement of their constitutional right under Due Process and Equal Protection.

Appellants simply assume that the law arising out of the facts in the "voting rights" cases applies to the facts alleged in the Bill of Complaint in this case. We

recognize that, in the "voting rights" cases, a simple allegation that a classification disfavors the voters in the county where they reside, or that they are placed in a position of constitutionally unjustifiable inequality to other voters, is a sufficient allegation of injury since this court has held that a citizen's right to vote, free of arbitrary impairment by state action, has been judicially recognized as a right secured by the constitution. *Baker* v. *Carr*, 369 U.S. 186 (1962). The grant by a state to its municipalities of the authority to extend police and sanitary regulations into the police jurisdiction, and to apply them in the same manner as they are applied within the corporate limits, has not been judicially declared to suffer from constitutional infirmity, and does not, without more, confer the right to vote.

We argue that the Plaintiff-Appellants lack standing in this case. *Warth* v. *Seldon*, 422 U.S. 490 (1975); *Flast* v. *Cohen*, 382 U.S. 83 (1968).

We argue further than in this case, although the Appellants allege, as a conclusion of the pleader, that they are denied the right to vote in municipal elections, the affirmative factual allegations indicate that they are not bona fide residents of the political subdivision, that they are not a part of the political unit, that they are not among those persons to whom the franchise has ever been granted, and that the existence of the basic right to vote is absent. *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Garren* v. *City of Winston-Salem*, 463 F.2d 54, (4th Cir. 1972), cert. den., 409 U.S. 1039 (1972); *Evans* v. *Cornman*, 398 U.S. 419 (1970).

An allegation that Plaintiffs are denied the right to vote, when alleged as a conclusion of the pleader, and along with allegations of facts which clearly negate

such right, falls short of alleging a case or controversy under the constitution.

We urge therefore that the action herein was not required to be heard and determined by a district court of three judges and that this court should not entertain the same on direct appeal. *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Moody* v. *Flowers*, 387 U.S. 97 (1967).

Pursuing the same argument to the effect that enabling legislation by a state, which permits police or sanitary regulations to extend and be in force beyond the city's territorial limits, is not, per se, unconstitutional or a violation of the fundamental law, we insist that the complaint fails to allege facts required to confer equitable jurisdiction or the right to equitable relief. There is no allegation (and Appellants concede this) that any one or more of the Appellants in this case is in any jeopardy of suffering irreparable injury resulting from extraterritorial extension of any specific police or sanitary regulation. *American Federation of Labor* v. *Watson*, 327 U. S. 585 (1946).

B. To the Merits.

It has been, and is, the contention of Appellees that under the meager allegations of the complaint herein, if case or controversy and standing can be found, (in the absence of alleging hurt, injury or controversy to any named Plaintiff arising from the enforcement of any specific regulation adopted pursuant to the enabling legislation), the only question substantially presented is whether or not the state statute enabling municipal police and sanitary regulations to extend beyond the city's territorial limits, is unconstitutional, per se, under either the Equal Protection or Due Process Clause.

This is not an orthodox "voting rights" case and the principle of those cases cannot be rationalized to support Appellants' claim that they have been denied equal protection of the laws as a result of being denied equal voting rights. *Garren* v. *City of Winston-Salem*, 463 F.2d 54 (4th Cir. 1972), cert. den., 409 U.S. 1039 (1972). The concept of law developed and established in the "voting rights" cases is particularly inappropriate to the facts in the instant case since the Appellants are not a part of and have never been a part of the political unit; they do not reside within the geographic boundaries of the city; they make no claim to have met residence requirements for voting. Neither the Appellants nor any other person similarly situated have ever been given the right to vote. *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Evans* v. *Cornman*, 398 U.S. 419 (1970); *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Pope* v. *Williams*, 193 U.S. 621 (1904).

As to the "compelling state interest" doctrine, Appellants herein do not allege facts showing an invidious discrimination or suspect classification, *McDonald* v. *Board of Election Comm. of Chicago*, 394 U.S. 802 (1969), or that state power is being used as an instrument to circumvent a federally protected right. *Gomillian* v. *Lightfoot*, 364 U.S. 339 (1960).

This court has held that a citizen's right to vote, free of arbitrary impairment by state action, has been judicially recognized as a right secured by the constitution, *Baker* v. *Carr*, 369 U.S. 186 (1962); that statutes limiting the franchise should be given a close and exacting examination since the right to exercise a franchise in a free and unimpaired manner is preservative of other basic civil and political rights; that any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized; that this is necessary since "*statutes distributing the franchise constitute the foundation of our representative society*". *Dunn* v. *Blumstein*, supra, (emphasis added); *Kramer* v. *Union Free School District*, supra. We argue that the granting of extraterritorial jurisdiction by a state to its political subdivision does not constitute an attack on the "foundation of our representative society". We know of no case, and no case has been cited to us, which holds that state enabling legislation extending police or sanitary regulations beyond the city's territorial limits is, per se, unconstitutional. Existing law is to the contrary.

We argue that the facts in this case should be judged under the Equal Protection Clause of the Fourteenth Amendment by the traditional standard of review which requires only that the state's system be shown to bear some rational relationship to legitimate state purposes. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973).

ARGUMENT

THE JURISDICTIONAL QUESTION

Although the Fifth Circuit Court of Appeals has ruled to the contrary, it has been and is the opinion of the Appellees that this action was not "required" to be heard and determined by a district court of three judges, and that this court should not entertain the same on direct appeal. *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Moody* v. *Flowers*, 387 U.S. 97 (1967).

In order to properly determine this question and in order to properly address this case at all, Appellees ask

the court to look at the Bill of Complaint in the eyes of a district or trial judge, and consider the allegations appearing on the face of the Complaint.

Appellants allege, apparently to show the inequality of their position, that the City of Northport or most of it is within three (3) miles of Tuscaloosa and that this City is not subject to the exercise of Tuscaloosa Police Jurisdiction, but that the residents who are in the community known as Holt area are subject to such regulations. Such allegation is without merit in that it completely ignores the fact that Northport is a second duly constituted municipal corporation contiguous to that of the City of Tuscaloosa, although lying on the North side.

Appellants have made the assumption, and we submit the erroneous assumption, that the rule of law so clearly established for the "voting rights" cases has been or should be extended to apply to any case wherein a state grants any vestige of extraterritorial jurisdiction to its municipalities. Appellants simply assume that the traditional standard of review under the Fourteenth Amendment, (that the State's system be shown to bear some rational relationship to legitimate State purposes) has been or should be abandoned, and that the strict judicial scrutiny test followed in the "voting rights" cases should be applied.

A close examination of the complaint shows an absence of allegations of any specific hurt or injury to any named plaintiff as a result of any municipal ordinance enforcing police or sanitary regulations extraterritorially. There is no specific allegation of live controversy.

Appellants' only attempt to allege facts showing a case or controversy normally required to vest jurisdiction in a federal court is set out in paragraph 13, subparagraphs (a), (b), (c), (d), and (e), of the complaint. (Appellants Br., p. 7 & 8).

In 13 (a), it is alleged that Plaintiff, Clyde Jones, has been required to purchase a license to engage in business in the police jurisdiction. There is no allegation that he is presently engaged in business or that he is now, or will in the future be, required to take out or pay for a license.

In paragraph 13 (b), it is alleged that two of the Plaintiffs have, at some time in the past, been required to purchase building permits from the City of Tuscaloosa and submit to inspections of building. There is no allegation that they are now engaged in such building or that they are now liable for building permits, or that they will in the future be so liable.

In paragraph 13 (c), it is alleged that several of the plaintiffs have been required to pay Tuscaloosa city tax on cigarettes bought within the Police Jurisdiction. It is common knowledge that no municipality in the State of Alabama is vested with the right to fix a tax on any person for the purchase of cigarettes, either within or without the City. The City of Tuscaloosa is authorized only to fix a privilege license based on the privilege of engaging in business.[1] Such a license might or probably does indirectly result in higher prices for items sold, but allegations such as those set out in 13 (c), (d) and (e), which in effect state that Plaintiffs have been required to pay higher prices because of a business license paid by a merchant or wholesaler, are not such allegations as would normally get a plaintiff into court. As stated in *Salyer* v. *Tulare Water District*,

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[1] Sec. 11-51-91, Code of Alabama, 1975.

410 U.S. 719 (1973), "Constitutional Adjudication cannot rest on any such house that Jack built foundation." *Salyer*, supra, 410 U.S. at 731.

Since some of Plaintiffs' allegations concern Title 37, Section 733, its legal effect should be clarified. Title 37, Section 733, purports to enable cities to fix a privilege license or privilege tax on trades or businesses conducted within the Police Jurisdiction, in an amount not to exceed fifty percent (50%) of that fixed within the corporate limits. Under judicial interpretation, the Alabama Supreme Court has held that a municipality may not adopt a license or ordinance effective within the police jurisdiction for the purpose of general revenue. The only authority the city has is the authority to charge a fee for regulation not to exceed the reasonable cost of services rendered. *Van Hook* v. *City of Selma*, 70 Ala. 361, 45 A.R. 85 (1881). Back as far as 1881, the cities were making some charges for municipal services outside of the city. In *Alabama Gas Co.* v. *City of Montgomery*, 249 Ala. 257, 30 So.2d 651 (1947), Title 37, Section 733, was construed, and the court concluded that this statute added nothing to the power or authority of the city to charge a fee outside of its corporate limits. It did hold, however, that the fifty percent (50%) maximum limitation applied, and also that the provisions limiting or apportioning the jurisdiction between two municipalities with overlapping police jurisdictions should apply.

Recently, the Alabama Supreme Court has ruled that a license tax or fee charged to a business or establishment outside of the corporate limits, but within the police jurisdiction, is invalid unless, in fixing such fee or license, the municipality makes an affirmative showing that the fee is based on the reasonable cost

of services provided. *City of Hueytown* v. *Burge*, Ala., 342 So.2d 339 (1977).

Appellees point to the provisions of 28 USC Section 1341, and insist that the district court has no jurisdiction in the matters alleged pertaining to licenses, taxes and fees, and has no jurisdiction to grant declaratory or injunctive relief in relation thereof.

Houston v. *Standard-Triumph Motor Co*, 347 F.2d 194 (5th Cir. 1965), cert. denied, 382 U.S. 974 (1966);

Annotation 17 L.Ed.2d 1026.

There is no allegation in the bill of complaint that any named plaintiff purporting to represent a class of plaintiffs, has been subject to the provisions of any ordinance of the City of Tuscaloosa enforcing police or sanitary regulations, (other than the payment of licenses or fees), and no allegation that any such person has been brought before the recorder of the municipality and fined or penalized for the violation of such ordinance, nor is it alleged that any such person has been threatened with such violation or penalty.

Appellees contend that these individual plaintiffs, alleging no actual case or controversy under any ordinance adopted pursuant to state enabling legislation (other than vague and past controversies involving the payment of taxes and fees where the court's jurisdiction is withheld), and having suffered no prosecution in recorder's court, fail to allege a justiceable controversy and lack standing to prosecute this case.

We recognize that, in the "voting rights" cases, a simple allegation that a classification disfavors the voters in the county where they reside, or that they are placed in a position of constitutionally unjustifiable

inequity to other voters, is a sufficient allegation of injury since this court has held that a citizen's right to vote, free of arbitrary impairment by state action, has been judicially recognized as a right secured by the Constitution. *Baker* v. *Carr*, 369 U.S. 186 (1962). We argue that the grant by a state to its municipality, of the authority to apply police and sanitary regulations within the police jurisdiction in the same manner as they are applied within the corporate limits, does not confer the right to vote and has not been judicially declared to suffer from any constitutional infirmity; that Title 37, Section 9, is not, per se, unconstitutional under either Due Process or Equal Protection of the Fourteenth Amendment.

Under this view, we would argue that the plaintiff-appellants lack standing. *Warth* v. *Seldin*, 422 U.S. 490 (1975); *Sierra Club* v. *Morton*, 405 U.S. 727 (1972); *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Baker* v. *Carr*, supra; *Bailey* v. *Patterson*, 369 U.S. 31 (1962).

The argument may be made that *Salyer Land Co.* v. *Tulare Water District*, 410 U.S. 719 (1973), is authority for holding that Plaintiffs herein have standing. In *Salyer*, non-property owners alleged that they were denied the right to vote in Water Storage District's general elections; that the vote, given only to landowners and weighed in favor of large landowners, violated their Fourteenth Amendment rights. The court there held that although Plaintiffs did not fall within the gamit of the "voting rights" cases, and could not rely on the strict state interest test developed therein, they were entitled to have their equal protection claim assessed to determine whether or not the state's action was "wholly irrelevant" to the achievement of its objectives.

We point out, however, that in *Salyer*, the Plaintiffs were resident citizens living in the area of the Water District and persons who had been granted the franchise and were part of the electorate for political purposes other than voting in the Water Storage District elections.

In this case, although the Appellants allege, as a conclusion of the pleader, that they are denied the right to vote in municipal elections, the affirmative factual allegations show that Appellants are not bona fide residents of the political subdivision where they seek to be allowed to vote; that they are not among those persons to whom the franchise has ever been granted; and that the existence of the basic right to vote is absent.

Dunn v. *Blumstein*, 405 U.S. 330, (1972);

Garren v. *City of Winston-Salem, N.C.*, 463 F.2d 54, (4th Cir. 1972), Cert den 409 US1039 (1972);

Evans v. *Cornman*, 398 U.S. 419 (1970).

An allegation that the Plaintiffs are denied the right to vote, when alleged as a conclusion of the pleader and along with allegations of facts which clearly negate such right, falls short, in our opinion, of alleging a case or controversy under the Constitution.

EQUITABLE JURISDICTION

This court has long required that a claim to equitable relief must show a controversy which will cause actual harm to plaintiff and that a court of chancery will not entertain a bill which seeks merely a declaration of future rights. *Cross* v. *DeValle*, 1 Wall. 5, 68

U.S. 5 (1863). The rule is clearly established that equity will not entertain a suit merely to vindicate an abstract principal of justice or to determine a dispute which involves neither benefit to be gained not injury suffered. *Foster* v. *Mansfield C. & L. M. R. Co.*, 146 U.S. 88 (1892).

In this case, however, we are faced with a much stricter rule which was pronounced by *American Federation of Labor* v. *Watson*, 327 U.S. 585 (1946). There the court said:

> "Where a federal court of equity is asked to interfere with the enforcement of state laws, it should do so only to prevent irreparable injury which is clear and eminent." *AFL* v. *Watson*, supra, 327 U.S. at 593.

Here the court was actually determining the applicability of a three judge court.

In the instant case, the complaint falls far short of alleging a threat of irreparable injury which is immediate and not remote. There are no allegations indicating irreparable injury which is clear and eminent. There is nothing contained in the allegations of the complaint from which one could infer that any one or more of the citizens who brought this suit is in any jeojardy of suffering irreparable injury resulting from extraterritorial regulations and hence, the complaint fails to allege facts sufficient to invoke traditional equitable jurisdiction and there is no need to convene a three judge court. *Boyle* v. *Landry*, 401 U.S. 77 (1971).

STATE STATUTE OF STATE-WIDE APPLICATION

In his memorandum opinion, Judge McFadden makes a very fine case that the challenged statute is not a state statute of general state-wide application.

(Appellant's jurisdictional statement, page 26 (a) through 37 (a). We agree with the trial court and point out further that 28 USC Section 2284, subparagraph (2) requires that at least five (5) days notice of hearing be given to the governor and attorney general of the state in those cases where action involves enforcement operation or execution of state statutes or state administrative orders. That was not done in this case.

Appellees, in their jurisdictional statement, filed a motion to affirm, (rather than a motion to dismiss or affirm), for the reason that, first, the Fifth Circuit had already ruled that a three judge court was required, *Holt Civic Club* v. *City of Tuscaloosa*, 525 F.2d 653 (5th Cir. 1975), and, secondly, because the three judge court did in fact rule on the merits. Notwithstanding this, however, if there is lack of standing or insufficient allegations to invoke equitable relief or to demonstrate an attack on a state statute of state-wide application, then a three judge court would not be required and the rule of *Moody* v. *Flowers*, 387 U.S. 97 (1967), and *Perez* v. *Ledesma*, 401 U.S. 821 (1971) would apply.

A GRANT OF AUTHORITY BY A STATE TO ITS MUNICIPALITIES TO EXERCISE EXTRATERRITORIAL REGULATION IS NOT UNCONSTITUTIONAL PER SE UNDER EITHER THE DUE PROCESS OR EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION

The powers of a state over its political subdivision and its citizens have historically been held to be, and are, broad and within the discretion of the state. *Sailors* v. *Board of Education of Co. of Kent*, 387 U.S. 105

(1967); *Reynolds* v. *Simms*, 377 U.S. 533 (1964); *Hunter* v. *City of Pittsburgh*, 207 U.S. 161 (1907).

In *Hunter*, the following appears:

> "It would be unnecessary and unprofitable to analyze these decisions or quote from the opinions rendered. We think the following principles have been established by them and have become settled doctrines of this court, to be acted upon whenever they are applicable. Municipal corporations are political subdivisions of the state created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently, they usually are given the power to acquire, hold and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state . . . the state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself or vest it in other agencies, expand or contract the territorial area, unite the whole or part of it with another municipality, repeal the charter and destroy the corporation. All this may be done conditionally or unconditionally, with or without the consent of the citizens or even against their protests. In all these respects, the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the constitution of the United States . . . the power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it." *Hunter*, supra, 207 U.S. at 178-179.

In *Reynolds*, the following appears.

> "Political subdivisions of states—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the state to assist in carrying out of state governmental functions. As stated by the court in *Hunter* v. *City of Pittsburgh*, (citation omitted), these governmental units are created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them, and the number, nature and duration of the powers conferred upon them and the territory over which they shall be exercised, rests in the absolute discretion of the state." *Reynolds*, supra, 377 U.S. at 575.

Historically, municipalities have been granted some extraterritorial regulation by the state and such grants, subject to traditional standards of review, have been recognized as within the police power of the state. Roman cities were normally and usually constructed behind walls and the term for the powers exercised within the walls was termed, "intramural" and outside of the walls was termed, "extramural". *Maddox Extraterritorial Powers of Municipalities in the United States* (1955).

In *McQuillin, Municipal Corporations*, 1966 Rev. Vol. 2, at Section 10.07, the following appears:

> "Sec. 10.07. *Intramural and Extramural.*
>
> Powers of municipal corporations are sometimes classified as (1) intramural and (2) extramural, the former indicating those powers which lawfully and effectively may be exercised within the corporate limits for the benefit of the inhabitants and all those who are within the municipal area; and the later indicating those powers which lawfully may be exercised beyond

the corporate limits. In short, intramural powers are those effective within the corporate limits and extramural are those effective without. Extraterritorial powers of some kinds are in some states expressly conferred on municipal corporations by the state constitution, or by statutes, or charters. And the rule is well established that the legislature may confer such extraterritorial power, at least for certain purposes, unless prohibited by the state constitution."

We quote the above from *McQuillin*, and the following from C.J.S. and American Jurisprudence to emphasize that the granting of extraterritorial powers by the state to its municipalities have traditionally and historically been considered a lawful and not an unlawful exercise of the police power.

In *62 C.J.S. 141*, the following appears:

"The legislature may, and often does, expressly or by implication, grant to municipal corporations the right to exercise police power beyond and within a prescribed distance of the municipal limits, especially for the preservation of public health, and accordingly, municipal corporations may have the implied right to exercise certain extraterritorial police powers when the possession and exercise of such powers are essential to the proper conduct of the affairs of the corporation."

In *56 Am. Jur. 2d, Sec. 436*, the following appears:

"The legislature has the power to confer on a municipal corporation police jurisdiction over adjoining territory immediately next to and within a specified short distance of the corporate limits. *There is no violation of the fundamental law* in a statute or charter provision under which some of the police regulations of

a municipality extend beyond its territorial limits . . ." (emphasis added).

Under rulings of this court, the Fourteenth Amendment is held not to prohibit states or political subdivisions thereof from prescribing regulations under their police power, limited in either the objects to which they are directed or by the territory in which they are to operate, so long as all persons subjected to such legislation are treated alike under similar circumstances, both in the privileges conferred and in the liabilities imposed. *Marchant* v. *Pennsylvania Railroad Co.*, 153 U.S. 380 (1894); *Hayes* v. *Missouri*, 120 U.S. 68 (1887); and *Barbier* v. *Connolly*, 113 U.S. 27 (1884).

In *Barbier*, the court held:

"The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws', undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under alike circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, . . ." *Barbier*, supra. 113 U.S. at 31.

When a statute or ordinance adopted under the police power is claimed to be contrary to due process and equal protection, the general test to be applied is that the classification bears some rational relationships to legitimate state purposes. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973).

Those attacking the law and the classification are required to bear the burden of showing that there is no

reasonable basis for it and that the classification is essentially arbitrary. *Salyer Land Co.* v. *Tulare Water District*, 410 U.S. 719 (1973); *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Kotch* v. *Board of Riverport Pilot Comm'rs.*, 330 U.S. 552 (1947); *Metropolitan Casualty Ins. Co.*, v. *Brownell*, 294 U.S. 580 (1935); and *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

In discussing the standard to be applied when the argument is made that a statute adopted under the police power bears no rational or substantial relation to the object of the legislation, and that the same was arbitrary, capricious and hence invalid under the Fourteenth Amendment, the court, in *McGowan*, held as follows:

> "Although no precise formula has been developed, the court has held that the Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some group of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power, despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan*, supra, 366 U.S. at 425-426.

Since the pleadings in this case point to or single out no specific ordinance of the city which enforces police or sanitary regulations extraterritorially, it can only be said that the issue raised herein is whether or not the grant or any grant of authority by the state to its municipality to extend police and sanitary regulations beyond its territorial limits is unconstitutional, per se, under either the Due Process or Equal Protection Clause of the Fourteenth Amendment.

Appellants herein ask this court to abandon the concepts of law developed in *Hunter* v. *City of Pittsburgh*, supra, and its progeny, to the general effect that the number, nature and duration of the powers conferred upon municipalities and the territory over which they are to be exercised rests in the absolute discretion of the state and to abandon the rule of law developed in the cases preceding the following *McGowan* v. *Maryland*, supra, to the effect that:

> "A century of supreme court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the state's system be shown to bear rational relationship to legitimate state purposes." *San Antonio School District* v. *Rodriguez*, supra, 411 U.S. at 40.

and to adopt and apply the rational or the voting rights cases.

We urge that this not be done.

THE RULE OF LAW APPLICABLE TO THE "VOTING RIGHTS" CASES AND THE COMPELLING STATE INTEREST TEST DEVELOPED TO PROTECT THE RIGHT TO EXERCISE THE FRANCHISE IN A FREE AND UNIMPAIRED MANNER IS NOT APPLICABLE TO A GRANT OF EXTRATERRITORIAL AUTHORITY BY A STATE TO ITS MUNICIPALITY.

In the instant case, the Appellants cite no case indicating that Alabama may not delegate to local governments a portion of its police power which comes

under the heading of Police and Sanitary Regulations. In fact, no argument is made to that effect, and the holdings are numerous and undisputed that within constitutional limits, a local government may exercise that power unchecked and may exercise it within further limits, extraterritorially. Appellants have presented no law which would undercut this presumption of constitutionality, and make no allegations of invidious classifications.

Appellants argue, however, that the operation of Title 37, Section 9, infringes on the constitutionality of a guaranteed right . . . here, the right to vote. Appellants analogize their position to that of those who prevailed in the "voting rights" cases which have held that any denial or dilution of the right to vote, once that right has been found to exist, is a denial of equal protection of the laws. In this case, however, Appellants do not contend that they meet any of the voter requirements for voting in Municipal elections. Thus, the existence of the basic right is absent. This would preclude Appellants from asserting that they are denied the right to vote in Municipal elections since they have no standing to do so. *Garren* v. *City of Winston-Salem*, 463 F.2d 54 (4th Cir. 1972), cert. den., 409 U.S. 1039 (1972).

In *Garren*, speaking of extraterritorial zoning, it was held:

> "This is not, however, an orthodox "voting rights" case. Nor do we think the principles of these cases can be rationalized to support Appellants' claim that they have been denied equal protection of the laws as a result of being denied equal voting rights. Appellants have not been denied any constitutionally protected rights of franchise or equal representation in municipal affairs. This is so simply because, not being bona fide residents of Winston-Salem, they have no standing to assert such rights." *Garren*, supra, 463 F.2d at 57.

We point out that residents of the police jurisdiction are subject to no different application of police and sanitary regulations than the residents of the City of Tuscaloosa. The fact that the residents of the police jurisdiction do not enjoy the same recourse to the ballot box is not the result of an invidious or suspect classification, or any other act of overt discrimination.

Concepts of law, developed and established in the "voting rights" cases, seem particularly inappropriate under the facts in the instant case. Appellants do not reside within the geographic boundaries of the City; they make no claim to have met residence requirements for voting. Neither the Appellants nor any other person similarly situated have ever been given the right to vote. *Dunn* v. *Blumstein*, 405 U.S. 303, (1972); *Evans* v. *Cornman*, 398 U.S. 419 (1970); *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Pope* v. *Williams*, 193 U.S. 621 (1904).

In addition, the constitutional guaranty of the right to vote under the Equal Protection Clause of the Fourteenth Amendment is neither alleged nor prayed for.

We find no case in which this court has given the franchise to persons who did not actually fulfill the requirements of bona fide residence.

Appellants cite *Evans* v. *Cornman*, supra, as precedent from this court that residence requirements be disregarded as a condition for voting. In *Evans*, however, the court held:

"Maryland may, of course, require that all applicants for the vote actually fulfill the requirements of bona fide residence (citations omitted). But if they are in fact residents, with the intention of making (the state) their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation." *Evans*, supra, 398 U.S. at 421.

The Court goes on to say, in the *Evans* case, that:

"This court has, of course, recognized that the states have long been held to have broad powers to determine the condition under which the right of sufferage may be exercised . . . *Once a franchise is granted to the electorate*, lines may not be drawn which are inconsistant with the Equal Protection Clause of the Fourteenth Amendment." *Evans*, supra, 398 U.S. at 422, (emphasis added).

In *Dunn* v. *Blumstein*, (supra), the following appears:

"We have in the past noted approvingly that states have the power to require that voters be bona fide residents of the relevant political subdivision. *E.g.*, *Evans* v. *Cornman*, 398 U.S. at 422; *Kramer* v. *Union Free School District*, supra, at 625; *Carrington* v. *Rash*, 380 U.S. at 91; *Pope* v. *Williams*, 193 U.S. 621." *Dunn*, supra, 405 U.S. at 343.

Appellants herein do not allege facts showing an invidious discrimination or suspect classification, *McDonald* v. *Bd. of Elections Com. of Chicago*, 394 U.S. 802 (1969), or that state power is being used as an instrument to circumvent a federally protected right. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

In their effort to liken the facts of this case to those of the "voting rights" cases, appellants are, in effect,

insisting that any grant of extraterritorial authority by a state to its municipalities stands on the same footing as arbitrary impairment by state action of a citizen's right to vote.

A citizen's right to a vote, free of arbitrary impairment by state action, has been judicially recognized as a right secured by the Constitution. *Baker* v. *Carr*, 369 U.S. 186 (1962).

In addition, the law established in the "voting rights" cases is Appellants' only vehicle to insist upon the "compelling state interest" test in the application of Due Process and Equal Protection under the Fourteenth Admendment.

This court has held that statutes limiting the franchise should be given a close and exacting examination since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights; that any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized; that this is necessary "since statutes distributing the franchise constitute the foundation of our representative society." *Kramer* v. *Union Free School District*, supra; *Dunn* v. *Blumstein*, supra.

Surely, the granting of extraterritorial jurisdiction by a state to its political subdivision does not constitute an attack on the "foundation of our representative society." Clearly, a citizen's right to vote, free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution. *Baker* v. *Carr*, supra, but the Appellants point to no case holding that a grant of extraterritorial jurisdiction to a municipality has been held to be, per se, constitutionally infirm.

Appellants in this case urge the court to strike down a state statute which extends police and sanitary regulations beyond the city's territorial limits and allows such regulations to be enforced equally, both within the corporate limits and within the area known as the police jurisdiction as being, per se, unconstitutional under the Fourteenth Admendment. In order to accomplish this, Appellants would have the Appellees bear the burden of proving compelling state interest under the Fourteenth Amendment. Appellants urge abandonment of the traditional standards set out in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973), as follows:

> "A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the state system be shown to bear some rational relationship to legitimate state purposes." *San Antonio School District*, supra, 411 U.S. at 40.

If the court abandons the traditional standard of review as stated above, Appellees believe the court would be doing that which was proscribed in *San Antonio School District* where it was stated:

> "It is not the province of this court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio School District, supra*, 411 U.S. at 33.

LITTLE THUNDER DISTINGUISHED

Appellants analogize the facts of the instant case to that of *Little Thunder* v. *State of South Dakota*, 518 F.2d 1253 (8th Cir. 1975), and it is insisted that residents of the Tuscaloosa Police Jurisdiction are

governed by the municipal authorities, although the allegations of the complaint to that effect are meager.[1]

Little Thunder dealt with a unique situation involving three counties and reservation Indians, which probably does not otherwise exist in the United States. Appellees argue that the organized county and attached unorganized county were encompassed by the same geographic and political boundary. That once a county was attached for government, then, for all practical purposes, the boundary of the organized county is simply extended to encompass the unorganized county. As stated by the court:

> "Here, however, as plaintiffs' urge, each of the unorganized counties and the organized county to which it is attached form a single unit of local government for administration of governmental and fiscal affairs, including all state, county, judicial, taxation, election, recording, canvassing, and foreclosure purposes, excepting in cases where the administration of said affairs is expressly otherwise provided by law." *Little Thunder* v. *State of South Dakota*, supra, 518 F.2d at 1256.

Actually, the unorganized county was brought under and became a part of the organized county, and yet the franchise, although given, was extended only to permit the residents to vote for school board members

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1 Any payment of a fee or charge by a person in the police jurisdiction would be paid by an industry or a merchant or a builder or some person either in business of building houses or developing subdivisions, and not one of the named Plaintiffs is alleged to fit this classification. There is no allegation of any specific incidents where a mere resident or homeowner has suffered any hurt from the authority of the city to enforce its police and sanitary regulations and yet, from aught that appears, each of the named Plaintiffs stand in that position.

and highway officials. They were not permitted to vote for all other elected officials.

The powers and authorities enumerated by the court, in *Little Thunder*, which the County Board of the organized county exerted over the unorganized county could, with minor exceptions, be a recitation of the authority that the Tuscaloosa County Commissioners exert over that area known as the Police Jurisdiction of the City of Tuscaloosa and the residents thereof.

The Tuscaloosa County Commission is a unit of local government for administration of governmental and fiscal affairs, including all state, county, judicial, taxation, election, recording, canvassing, and foreclosure purposes, excepting in cases where the administration of said affairs is expressly otherwise provided by law.[1]

County Commissioners (in Tuscaloosa County) have the authority to enact the rural and airport zoning regulations; construct and repair bridges and highways; designate through or main highways, (subject to state highway director's rules); establish and maintain public parks, county fairs, and free libraries; contribute to health centers; provide for assistance and deputies in county offices; generally supervise the fiscal affairs and levy taxes on all property in the county.

In effect, the Tuscaloosa County Commission manages and governs not only those people residing in the police jurisdiction, but also the citizens residing

1 Code of Alabama, 1975, Title 11, Chapters 1 through 22, contains much of the authority granted to the County and its governing body.

within the corporate limits of the City. The County has a Probate Judge who maintains register of deeds, records all deeds, mortgages, or instruments required to be filed. The County Commission and the Probate Judge are responsible for maintaining the fiscal integrity of county government. The County Tax Collector is charged with the duty of collecting taxes and the Tax Assessor is charged with the duty of assessing taxes; the County Sheriff is obliged to keep the peace and is the chief law enforcement officer of the County. The county has an elected Coroner.

All of these county officials are voted for and elected by members of the police jurisdiction. They are not governed by the adjacent municipal corporation in any sense of the word.

Possibly, a listing of authorities that the governing body of the municipality does not possess, outside of its corporate limits, would be persuasive.

The City does not levy or collect taxes and has no right to make any charge for general revenue purposes; the City does not have any control or jurisdiction of streets, roads or highways, which serve the Police Jurisdiction outside of the City; the City does not control or operate parks and recreation within the Police Jurisdiction, since this function is performed by a County Park and Recreation Board; the City does not provide a hospital, since a County Hospital is provided, controlled by an independent County Hospital Board; the City may not condemn lands outside of the Corporate Limits for public or park purposes unless under a specific grant under the State Legislature; the City performs very limited health services since the County and State Boards of Health are vested with this authority; the City performs no function pertain-

ing to voting, preparation of qualified electors lists, or establishing voting districts outside of the City; the City does not maintain a public library, but contributes to a City-County Library serving all the people of the County and controlled by a separate Library Board; the City exercises no zoning outside of its Corporate Limits, nor does it operate or exert any control over the schools or school system outside its boundaries.

In the State of Alabama, a municipality is simply and solely a creature of the state and possessed only of those powers expressly conferred upon it by law or necessarily implied from such express grant.

> "Municipalities are mere instrumentalities of the State, and possess only such powers as may have been delegated to them by the Legislature." *City of Leeds* v. *Town of Moody*, 294 Ala. 496, 319 So.2d 242 (1975).

We submit that that area of the police jurisdiction outside of the corporate limits is not governed by the governing body of the City of Tuscaloosa and the facts in *Little Thunder* are not analogous to those in the instant case.

ALTERNATIVE METHODS

Appellants suggest alternative means by which legitimate state purposes could be achieved in the area immediately surrounding a municipality without extending police and sanitary regulations beyond the city's territorial limits. (Appellants' Brief, Pages 24-27).

We do not doubt that there may be as many proposals, as to the type and form of legislation available to achieve state purposes, as there are teachers of political science, but the question here is not whether

we like the system, agree with the system, or could devise another system. All those questions are matters for the duly elected state governing body to determine so long as constitutional boundaries are not transgressed. *Salyer Land Co.* v. *Tulare Water District*, supra, 410 U.S. 719 at 732 (1973); *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

GOVERNMENT WITHOUT FRANCHISE

At Page 27 and following of Appellants' Brief, Appellants argue that government without representation or government without franchise is a violation of the Due Process of the law.

Without doubt, the "guaranty clause" of the Constitution does guarantee the right to vote.

As stated by Mr. Justice Douglas, in his concurring opinion in *Baker* v. *Carr*, supra, 369 U.S. at 242:

> "The right to vote is inherent in the republican form of government evisaged by Article 4, Section 4, of the Constitution."

We maintain, however, that the Appellants are in no sense of the word governed. Appellants herein vote for their state senators and state legislators who fashion the laws complained of in this suit. Those same state legislators and senators create or dissolve municipal corporations. Here, the statutes, (authorizing police and sanitary regulations to extend beyond the city's territorial limits), were enacted by a legislature in which all of the State's electors had the unquestioned right to be fairly represented. *Associated Enterprises* v. *Toltec District*, 410 U.S. 743 (1973).

The question presented here is, can the duly elected representative body provide, by general law, that some

police or sanitary regulations may extend beyond the city's territorial limits and, thus, be enforced both within the municipal corporation and within a limited area bordering the municipal corporation?[1]

WRONG REMEDY REQUESTED?

We answer Appellants' argument that the court should not have dismissed the complaint because the wrong remedy was prayed for and that the court erred in not granting the residents of the police jurisdiction the right to vote as follows:

First, the Appellants misconstrue the Court's order, which did not indicate that Appellants were entitled to be given the right to vote, but simply, in passing, referred to the fact that the Plaintiffs "do not seek an extension of the franchise for themselves".

Secondly, we point out that since the basic right to vote is not present, and since Appellants and the class of persons whom they seek to represent have never

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1 We point out that, although Tit. 37, Sec. 9, states that ordinances of a city or town enforcing police or sanitary regulations, and prescribing fines and penalties for violations thereof, shall have force and effect in the limits of the city or town and in the police jurisdiction thereof . . . (the word "shall" have force and effect, not the word "may" have force and effect, is used), many city ordinances are, by their terms, limited to the corporate limits and others, even when not so limited, are not enforced without the corporate limits.

The application and enforcement of police and sanitary regulations is not financially beneficial to a municipality. Areas differ widely. One area may be entirely rural and require little, if any, extraterritorial enforcement, whereas, other areas which may have developed, and developed in particular or peculiar ways, may seek more such regulation. No two regulations are alike, and no two cities are required to extend territorial jurisdiction of police and sanitary regulations on a like basis.

been made a part of the electorate, they are simply not entitled to vote. Appellants are not within the class of voters chosen and whose qualifications have been specified. *Hadley* v. *Junior College District*, 397 U.S. 50 (1970).

The statement appearing at Page 31 of Appellants' Brief that:

> "The relief requested would not disrupt innovative state governmental experiments because the authority challenged is virtually unique and not of recent origin";

was apparently inserted to counter the often quoted statement by this court that:

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the constitution to prevent experimentation." *Hadley* v. *Junior College District*, supra, 397 U.S. at 59; *Sailors* v. *Kent Board of Education*, 387 U.S. 105 (1967) at 110-111.

Such an argument we believe is not persuasive when determining whether or not a state statute transgresses the federal constitution.

On the other hand, we believe that the above statement is recognition by this court that nearly every municipality is faced with the problem of granting services within its expanding boundaries and attempting to bring order to the rapid and sometimes chaotic development in the area immediately surrounding the municipality and that the state has an interest in the orderly development and minimal control of the area sometimes called "suburbian area" or "suburbia" im-

mediately adjacent to the boundaries of the municipal corporation; that these areas are ones which are or soon will be seeking incorporation into the corporate limits; seeking services in the nature of water, sewer, sanitation, police, fire, zoning and health protection. Although developing industrially, the State of Alabama has long been a rural state, and rural cut-over areas surrounding the municipality are often ill able to afford and to provide police, fire and health services. It is beneficial to the residents of this rural area to be able to call on and depend upon some enforcement of police and sanitary regulations. At the same time, the municipality is often faced with undesirable, unhealthy, or unsanitary conditions developing in close proximity to its borders and some minimal control is beneficial to the municipality. Thus, the extraterritorial jurisdiction has in the past functioned, and does now function, as a benefit both to the municipality and to the surrounding area which it serves. Certainly it bears rational relationship to legitimate State purposes.

More recently, when the trend has turned to suburbian development and to the movement of business and industry from the central city, it is usually the municipality which is equipped and staffed to provide some planning control, some subdivision control, some supervision of orderly development to prevent the annexation of substandard areas requiring immediate urban renewal. At the same time, the rural and sparsely populated area, (prior to growth and development), is not so staffed and equipped and can ill afford a duplication of such services.

We urge the court to find that the above are facts which "reasonably may be conceived to justify" Alabama's decision to extend police and sanitary regulations beyond the City's territorial limits. *Salyer Land Co.* v. *Tulare Water District*, 410 U.S. 719 (1973).

We urge the court to adopt the view that the granting of extraterritorial regulation to a municipality by the state is not, per se, a violation of a federally protected right and that "save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs". *Sailors* v. *Kent Board of Education*, supra; *Gomillian* v. *Lightfoot*, 364 U.S. 339 (1960).

Appellees urge this court to affirm the judgement of the three judge court.

Although the single judge court had dismissed the case on motion, the Fifth Circuit reversed and held that the issues were required to be heard by a three judge court. In this posture, the three judge district court accepted the case.

It has been, and is, the argument of the Appellees that under the meager allegations of this case, if case or controversy and standing could be found, in the absence of alleging hurt or injury by any specific ordinance adopted pursuant to the enabling legislation, then the only question substantially presented is whether or not extraterritorial regulation is unconstitutional, per se, under either the Equal Protection or Due Process Clause.

CONCLUSION

The District Court's ruling that, under the facts in this case, extraterritorial regulation is not, per se, unconstitutional under either Equal Protection or Due Process Clause and granting Plaintiffs leave to amend and specify particular ordinances which are claimed to deprive Plaintiffs of liberty or property, was correct and should be affirmed by this Court.

Respectfully submitted,

J. WAGNER FINNELL
Tuscaloosa, Alabama

ATTORNEY FOR APPELLEES

FOR ARGUMENT

IN THE SUPREME COURT
OF THE UNITED STATES

NO. 77-515

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Appellants,

vs.

CITY OF TUSCALOOSA, etc., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA

REPLY BRIEF FOR THE APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

REPLY BRIEF FOR APPELLANTS

I.

JURISDICTION

A. Appellants Have Standing to Challenge the Statutes Here Involved.

Appellees in their brief to this Court suggest for the first time that appellants totally lack standing in the sense of a lack of a live controversy

between the parties.[1] Appellants suggest, however, that a case or controversy is plainly reflected in this record.[2]

Appellees implicitly acknowledge that the complaint alleged proper standing at some point, appellants being subjected to various licenses and permits. Brief of Appellees, 11. But, for example, they

1. The only prior "standing" argument raised was a lack of jurisdiction by virtue of 28 U.S.C. §1341, and a claim in the court of appeals that certain regulatory actions had not been applied to named plaintiffs. Brief of Appellees, No. 75-3323, p. 8.

2. Although standing is relevant at any point during litigation, Steffel v. Thompson, 415 U.S. 452, 459 n. 10 (1974), appellants suggest that the failure to raise this issue previously in the five years this case has been pending reflects the issue's lack of merit. It is not based on any newly developed circumstances. As pointed out in appellants' brief, appellees conceded standing in the court of appeals. There was no apparent need to supplement the record on remand to further establish standing. If there is any question of standing factually, appellants would welcome an inquiry into standing on remand.

complain that "[t]here is no allegation that [plaintiff Clyde Jones] is presently engaged in business or that he is now, or will in the future be, required to take out or pay for a license."[1] Ibid. But beyond allegation, the record reflects the governmental activity of building permits, licenses, police patrolling, etc., for 1973-75. (A. 13-16, 33-35, 41) In view of the record and the fact that the district court found that plaintiffs had standing to represent the residents of the police jurisdiction (JSA 24a-25a), it borders on the frivolous to suggest that the appellants and the class they represent are not currently subjected to the acts complained of. See, Wooley v. Maynard, 430 U.S. 705 (1977); Ellis v. Dyson, 421 U.S. 426 (1975).

1. An exact time of these instances was not pleaded. While defendants have never been required to answer, four motions to dismiss were filed in the district court. Defendants never joined issue on whether the injuries were on-going. The record reflects that they clearly are, but beyond this, the attempt to so frame the issue at this stage is known in other contexts as "sandbagging." Wainwright v. Sykes, 433 U.S. 72, 89 (1977).

There cannot be a serious question that appellants have alleged facts which establish that they have in fact been injured by the matter they seek to have reviewed. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38-39 (1976). The impact that the challenged statutes has on each resident of the police jurisdiction is direct, easily perceived and ascertainable, not in the least bit theoretical or speculative, and traceable directly to the defendants. Compare, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Ellis v. Dyson, 421 U.S. 426 (1975); United States v. SCRAP, 412 U.S. 669 (1973); Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970); and Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971) with Warth v. Seldin, 422 U.S. 490 (1975); Simon v. Eastern Kentucky Welfare Rights Organization, supra; Linda R.S. v. Richard D., 410 U.S. 614 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Flast v. Cohen, 392 U.S. 83 (1968).

B. This Court Has Jurisdiction to Hear This Appeal.

Appellees do not press their argument that a three-judge court was not required, save to recite the law that a three-judge court is necessary only when a statute of statewide application is involved.[1] This prerequisite exists here, Brief of Appellants, 18-19, and appellants will not argue this further.

Nor do appellees appear to press the argument that the Tax Injunction Act, 28 U.S.C. §1341, bars jurisdiction. They "insist" upon it with no discussion. Brief of Appellees, 13. But even if collection of taxes were the sole issue herein, appellees have not disputed appellants' contention that "a plain, speedy and efficient remedy" in the state courts does not exist. Compare, Tully v. Griffin, Inc., 429 U.S. 68 (1976). If appellants were seeking to challenge a state tax, or even if their constitutional claims were

1. They do mention that no notice of hearing five days in advance to the governor and attorney general was given as required by 28 U.S.C. §2284. Since there has never been a hearing in this case the relevance of this argument is not readily apparent.

perceived to be a sham in order to enjoin a state tax, then §1341 might be of some moment. But when the power to govern is the core issue, taxing authority being merely incidental thereto, the federal judicial forum cannot be closed to appellants for the reasons previously stated in Brief of Appellants, 12-13.[1]

II.

MERITS

Appellees have suggested only one possible substantial state interest for the governing (by some entity) of police jurisdictions--that of providing some

1. The purposes of Congress in enacting §1341, to prevent disruption of state revenue collections by suits brought by foreign corporations and to remove the advantage of out-of-state litigants with access to federal courts, S.Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937); H.R. Rep. No. 1503, 75th Cong. 1st Sess. 1-2 (1937), are not at all disserved by maintenance of this suit.

Appellants would also point out that the Anti-Injunction Act, 28 U.S.C. §2283, has no relevancy here for there are no state court proceedings. See, e.g., Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977).

government for the urban fringe.[1] The questions that follow are (a) whether the structure challenged infringes rights such that it must be justified as necessary to further this interest and (b) if so, whether it is so justified.

A. The Governing Without Franchise Must Be Justified as Necessary to Further the State's Interest.

Appellants raise a challenge where there has been an extension of general governmental powers. Appellees erroneously state the issue as being whether or not strict judicial scrutiny must be applied where "a state grants any vestige of extraterritorial jurisdiction to its municipalities." Brief of Appellees, 10 (emphasis added).

1. Appellees have not elaborated on their claim that the governing is both for the benefit of police jurisdiction residents and to protect city residents from undesirable conditions in the police jurisdiction. Motion to Affirm, 5. That some government is necessary does not at all mean that governance by the adjacent municipality is necessary. The argument that cities want to protect "the citizens within the municipality from unwholesome, unhealthy and unlawful activities. . .immediately adjacent," ibid., is a two-way street.

The appellees' argument that the strict scrutiny standard is not applicable to this case is based on Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973). The basis of the Court's holding in Salyer was that the one person - one vote requirements of Reynolds v. Sims, 377 U.S. 533 (1964), and its progeny did not apply "by reason of [the district's] special limited purpose and of the disproportionate effect of its activities on landowners as a group," 410 U.S. at 728. While the rational relationship standard applies upon a finding of a special, limited purpose, Salyer reaffirmed that strict judicial scrutiny applies to general governmental authority. Avery v. Midland County, Texas, 390 U.S. 474 (1968). Salyer, supra at 728.

Nearly all of the municipal services the Court noted to be lacking in Salyer are provided by the City of Tuscaloosa for the police jurisdiction: public transportation, fire department, and police. There has been no claim, much less a showing, that the City of Tuscaloosa (as it exists to provide services and governance to the police jurisdiction) is a special, limited purpose

government like the Tulare Lake Basin Water Storage District. It can hardly be gainsaid that appellants have "a distinct and direct interest" in the government imposed upon them. Kramer v. Union Free School District No. 15, 395 U.S. 621, 632 (1969); Salyer, supra at 726.

Appellees' argument that the Holt residents do not live in Tuscaloosa and therefore have no right to vote in Tuscaloosa elections simply begs the question. As appellants have already pointed out (Brief of Appellants, 21), the residents of Holt live inside the City of Tuscaloosa for purposes of the City's jurisdiction over them but live outside the City for purposes of their jurisdiction (i.e., the right to vote) over the City government.

In Dunn v. Blumstein, 405 U.S. 330 (1972), this Court invalidated a distinction between old and new residents. The result would have been no different if Tennessee had sought to define new residents as not being "residents" at all. Yet such a definition is at the core of this argument of appellees.

Even where a suspect classification or a fundamental right is not involved,

this Court has construed the Fourteenth Amendment to forbid arbitrary and discriminatory classifications by the State. Under this traditional rational relationship test:

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Johnson v. Robison, 415 U.S. 361, 374-75 (1974), quoting from Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

Accord: Vlandis v. Kline, 412 U.S. 441 (1973)(irrebuttable presumption of non-residency invalid). The definition of police jurisdiction residency does not even meet this test.

In the effort to avoid the stricture of the equal protection clause, appellees argue that the State has simply transferred or assigned some of its police power over unincorporated areas to cities. This ignores the fact all police power belongs to the State and all power possessed by a city has been transferred from the State. The question is not the source of the power but whether the State may allow some

persons and not others subject to the jurisdiction of the State's delegate (the city) to vote in elections to choose those who wield the power. This Court has previously held that

> Inequitable apportionment of local governing bodies offends the Constitution even if adopted by a properly apportioned legislature representing the majority of the State's citizens. Avery v. Midland County, Texas, 390 U.S. 474, 481 n. 6 (1968).

If power is to be placed in the hands of a local government, that government must comply with the equal protection clause in its electoral structure. At bottom appellees claim that appellants had a voice in the selection of state level officials who fashioned the government. "Appellants herein vote for their state senators and state legislators who fashion the laws complained of in this suit." Brief of Appellees, 33. Not only was this expressly refuted in Avery, supra, but presumably that argument, if correct, would have ended the claim in Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969), for the restricted franchise in school board elections held unconstitutional there was also encompassed in state statutes.

Appellants make one further argument to avoid the strict scrutiny test--that police jurisdictions are not really governed but merely regulated. They actually claim that residents of the police jurisdiction "are not governed by the adjacent municipal corporation in any sense of the word." Brief of Appellees, 31.

In order to show that the City of Tuscaloosa does not govern in the police jurisdiction, the appellees list the powers that the County of Tuscaloosa may lawfully exercise in the police jurisdiction, in the City of Tuscaloosa, in fact anywhere in the County. They list powers and responsibilities that the City of Tuscaloosa does not have in the police jurisdiction.[1] Brief of Appellees, 30-32). These two

1. Most of the powers listed as being absent in the police jurisdiction (Appellees' Brief at 31) are also absent within the City. As the appellees point out, there is a county recreation board, a county hospital, a county library, a county board of health, a county board of registrars. The presence or absence of these powers does not tell us anything about the difference in authority exercised by the City within the City proper and within the police jurisdiction.

Finally, the City claims it "does not have any control or jurisdiction of streets, roads or highways" in the police jurisdiction. Id. But it regulates the speed and movement of traffic over these roads, see Addendum A to Appellants' Brief, A-2.

lists neatly avoid a comparison of the City's powers in the City with its powers in the police jurisdiction.

Alabama law requires a city to enforce all of its "police and sanitary regulations" in the police jurisdiction, Ala.Code §11-40-10 (1975). The only type of "police power" that has been excluded from this broad definition is the power to zone for land uses. The city may collect a license fee or tax in the police jurisdiction of not more than one-half of the amount charged within the City limits, Ala.Code §11-51-91(1975). The differences between the powers in the City and in the police jurisdiction are not great at all. The appellees prefer to refer to these powers as "regulations" (Brief of Appellees, 36) and claim that the City does not govern the police jurisdiction. Whatever they are called, the fact remains that the people of Holt are governed in much the same way that Tuscaloosans are--but without the right to vote in city elections.

The appellants and those they represent are residents of an area under a general governmental authority, an authority

in which others may participate by the elective franchise, but from which franchise appellants are excluded. Consequently, the authority without representation must be shown to be necessary to further the state's interest. Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

B. The State Has Not Advanced a Single Argument Seeking to Establish that the Governmental Structure at Issue is Necessary to Further Its Interest in Governing the Police Jurisdiction.

Appellees seem to believe that they have answered the constitutional question when they point out the need for regulation of the developing areas on the urban fringe outside the municipality, but they have failed to show any compelling reason why the method of government must be one which allows some persons, and not others, to vote. Their contention "that there may be as many proposals, as to the type and form [of government for the urban fringe], as there are teachers of political science" (Brief of Appellees, 30) apparently assumes that the issue in this case is

only an academic question of political science theory and not a constitutional one.

Appellees miss the point. If any method of government formation is less restrictive of appellants' rights, then the current structure "is not the least restrictive means necessary" to further the state's interest, Dunn v. Blumstein, 405 U.S. 330, 353 (1972).

Each of the alternatives appellants proposed in Brief of Appellants, 26, could be carried out in a manner consistent with the one person-one vote principle. The present system of extraterritorial powers, as exercised by Alabama cities, is not justified by necessity to meet a compelling need; rather there are less objectionable methods of exercising some governmental control over the urban fringe.

Appellants do not suggest these forms as options from which the Court should choose. They are suggested merely to establish first, that the present system is not the least restrictive means and second, that a decision that the current system is unconstitutional will not leave

the areas presently governed as police jurisdictions in a void. There is currently substantial governance available in Alabama by county and special purpose government.

This Court's recent decision in Foley v. Connelie, __U.S.__, 98 S.Ct. 1067 (1978), strongly supports appellants' contention that their general governance without electoral participation is unconstitutional. In Foley, the Court held that the police function is "one of the basic functions of government," "a most fundamental obligation of government to its constituency." 98 S.Ct. at 1071. The Court held that a state could restrict the position of police officer to citizens, those who could vote. Citizens can thereby participate in the making of policy and oversee its implementation. Such a restriction "represents the choice, and right, of the people to be governed by their citizen peers. . ." "The execution of the broad powers vested in [the police and other local officials] affects members of the public significantly and often in the most sensitive areas of daily life." 98 S.Ct. at 1071.

In contrast, appellants here are forbidden to choose the people by whom they are directly governed or to participate in formulation of the policies local officials will implement. They are thereby denied the basic right "to be governed by their citizen peers." Ibid.

CONCLUSION

This Court and the court below are properly vested with jurisdiction to decide this cause.

Appellants and those they represent are denied equal protection and due process of the laws because they are governed without the franchise, a franchise extended to others similarly situated. The State having advanced no justification for subjecting plaintiffs to its local governing structure without their electoral participation, the decision below must be reversed and remanded for consideration and issuance of appropriate relief.

Respectfully submitted,

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